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C A S E S

RELATING TO

RAILWAY, CANAL, AND JOINT
STOCK COMPANIES,

ARGUED AND ADJUDGED IN THE

Courts of Law and Equity;

1850 to 1854.

BY

JONEL OLIVER, EDWARD BEAVAN, & THOMAS E. P. LEFROY, .
ESQUIRES, BARRISTERS-AT-LAW.

—♦—
VOL VII



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1855.

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ERRATA.

Page 221, 4 lines from bottom, for confirmed, read conferred.

„ 366, last line, for and of all read and all.

*„ 403, 8 lines from bottom, for “Lands,” read “ Railways ” Clauses Consolida-
tion Act.*

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RAILWAY, CANAL, & JOINT STOCK CASES.

BEFORE VICE-CHANCELLOR LORD CRANWORTH.

1851.

PRESTON v. THE LIVERPOOL, MANCHESTER, AND NEWCASTLE-
UPON-TYNE JUNCTION RAILWAY COMPANY.

*June 7th,
14th & 21st.*

THIS was a general demurrer to a bill filed by C. Preston, of Flasby Hall, in the county of York, Esq., against the above-named Railway Company and their chairman. It appeared from the statements in the bill, (in addition to those hereafter set out in the judgment), that, shortly before the institution of this suit, the Railway Company had been endeavouring to raise the money for the formation of the line, and had then recently obtained from the Commissioners of Railways an extension of the time limited by the Act for the compulsory purchase of land, and for the completion of the railway, and that such extended time had not expired. The bill prayed, that an agreement, bearing date the 5th of February, 1846, entered into between Messrs. Harper and Yates, therein described as the executive directors of the Lancashire and North

In 1846, H. and Y., on behalf of a projected Railway Company, called the Lancashire &c. Company, entered into an agreement with the plaintiff, that he, on his part, should assent to the Railway being made through his property, as laid down in the deposited plans of the Company, and that the Company should, on their part, in case they obtained an Act of incorporation, pay to the plaintiff

1000*l.* for all lands required for the due making of the railway, and a further sum of 4000*l.* for residential injury. The Lancashire &c. Company afterwards united with the Liverpool &c. Company in projecting a Railway, which, so far as the plaintiff was concerned, was to follow the line proposed by the first-named Company. The two Companies joined in an application to Parliament, and obtained an Act of incorporation. The bill alleged, that the agreement with the plaintiff had been recognised by the united Company. No steps having been taken to enter upon the land, the plaintiff, in 1851, filed his bill to enforce performance of the agreement. To this bill the defendants demurred generally.

The defendants having exercised an option, given them by the Court, of taking a case for the opinion of a Court of law, the order of the Court was suspended until that opinion had been obtained.

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Yorkshire Railway Company of the one part, and the plaintiff of the other part, might be declared to be binding upon the said Railway Company, and that they might be decreed to complete the purchase of the pieces of land agreed to be purchased and set out as therein mentioned, and all other, if any, the land required by them for making a railway, by paying the plaintiff the sums of 1000*l.* and 4000*l.*, and the expenses of the plaintiff's solicitor mentioned in the agreement, and to enter into possession of such land.

The facts on which the decision of the Vice-Chancellor is founded, are stated in the outset of his judgment.

Mr. *Bethell* and Mr. *H. Humphreys* appeared in support of the demurrer, and contended, that the agreement was not binding on the defendants, inasmuch as it had been entered into on behalf of a former Company which had never obtained an Act of Parliament, and had not, in fact, ever applied to Parliament at all. That the plaintiff had not been called on to withdraw his opposition to the bill which had passed, and had therefore not given that part of the consideration for the contract. That the Act of Parliament incorporating the Company did not recognise the agreement with the plaintiff, and that the Act alone declared the powers and liabilities of the Company. That the cases in which specific performance had been decreed were those in which the Company, after the passing of their Act, had ratified agreements entered into previously to the passing of their Act, either by part performance or by affixing their seal to them; that at all events the contract was only conditional, on the Company requiring the plaintiff's land; that the consideration money was the price of the land to be taken, and was never intended to be paid, at all events, to the plaintiff as the price of his assent to the bill alone.

The *Solicitor-General*, Mr. *Southgate*, and Mr. *Preston* in support of the bill, contended, that a Company, when incorporated, were bound by the agreements of the man-

aging committee and directors made previously to their Act; that the effect of the decision of the Vice-Chancellor of England in *Columbine v. Chichester* was to recognise that principle; and although in that case the demurrer to the bill was afterwards, on appeal, allowed, yet the judgment of the Vice-Chancellor was reversed on other grounds, and did not impugn the principle on which he had overruled the demurrer; that, in this present case, the objection to the contract on the ground of the Company having amalgamated with another, could not be admitted, for the bill stated, "that the plaintiff and other landowners withdrew their opposition in Parliament, upon the faith of the agreements entered into with the prior Company being observed, and that the incorporated Company would perform those agreements; and that, after the incorporation of the Company, the directors and shareholders had at various meetings and otherwise approved of and adopted all the agreements with landowners, and especially the agreement with the plaintiff:" *Stanley v. The Chester and Birkenhead Railway Company* (a). They further contended, that the agreement to withdraw opposition in Parliament was of itself a good consideration for the contract, and had prevailed in the cases of *Simpson v. Lord Howden* (b), and *Lord Petre v. The Eastern Counties Railway Company* (c); that the incorporated Company could not act in violation of their agreement, although it had not been specially referred to by the Act: *Edwards v. The Grand Junction Railway Company* (d); that the actual formation of the Railway did not affect the plaintiff's rights under the agreement; and that it was an absolute, not a conditional agreement: *Bland v. Crowley* (e).

Mr. Bethell replied.

(a) Ante, Vol. 1, p. 58.

(b) Id. p. 326.

(c) Id. p. 462.

(d) Ante, Vol. 1, p. 173.

(e) Ante, Vol. 6, p. 756.

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The VICE-CHANCELLOR.—This was a demurrer to a bill seeking to enforce against the defendants, The Liverpool, Manchester, and Newcastle-upon-Tyne Railway Company, an agreement of the 5th of February, 1846, which had been entered into between the plaintiff and two gentlemen, named Harper and Yates. The bill states, that, in the year 1845, Harper, Yates, and others, projected a Railway, to be called The Lancashire and North Yorkshire Railway Company, which was intended to pass near the plaintiff's residence of Flasby Hall, and for making which they required some of his lands.

In 1846, they introduced a bill into Parliament for the purpose of establishing that Railway; the plaintiff prepared to oppose it; and, in order to prevent his opposition, the following agreement was entered into:—

“ 5th February, 1846.

“ Memorandum of agreement, this day made between the executive directors of the Lancashire and North Yorkshire Railway Company, of the one part, and C. Preston, of Flasby Hall, in the county of York, Esq., of the other part: It is agreed, that, on the following conditions, the said C. Preston will and does assent to the Railway being made through his property at Flasby Hall, as laid down in the deposited plans of the said Company; that, in case the said Company shall, in this or any subsequent session, obtain an Act of incorporation, the said Company shall pay to the said C. Preston, his heirs or assigns, the sum of 1000*l.* for all lands required for due making the Railway, and a further sum of 4000*l.* for residential injury to the estate and Hall of the said C. Preston; that the Company shall pay the expenses of Mr. Preston's solicitor in this business, and 25*l.* for his own personal expenses.”

In the same session, certain other projectors introduced into Parliament a bill for a rival line, to be called The Liverpool, Manchester, and Newcastle Junction Railway; and a third set of projectors brought in a bill for another rival line, to be called The Northumberland and

Lancashire Junction Railway. The third line, however, needs not to be considered, for, as far as I understand, nothing turns on it. The projectors of the two first lines, that is, the Lancashire and North Yorkshire, and the Liverpool, Manchester, and Newcastle line, agreed to unite and form a line, which should, so far as relates to the plaintiff's lands, follow the line proposed by the Lancashire and North Yorkshire Company; and they expressly agreed to adopt the contract of the 5th of February, 1846, on the faith of which the plaintiff withdrew his opposition.

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I have taken all these facts from the statements in the bill. On the 26th of June, 1846, an Act passed, incorporating this new Company by the name of The Liverpool, Manchester, and Newcastle Junction Railway Company. The books deposited with the Clerk of the Peace, and referred to in the Act, enumerate several of the plaintiff's fields, through which the line of the Railway was to pass. The defendants, after the passing of the Act, set out the line of the Railway over the plaintiff's lands, and gave notice that they should require the same, but they have never taken possession thereof, though the plaintiff has always been ready to give them up. The object of the present suit is to enforce performance of the agreement, and to obtain payment of the 1000*l.* and 4000*l.*

The plaintiff says, that the contract of Harper and Yates is binding in equity on the defendants. The doctrine of the Court on this subject is, that, where proprietors of a Company enter into contracts on behalf of a body not existing at the time of the contract, but to be called into existence afterwards, there, if the body, for whom the projectors assumed to act, does come into existence, it cannot take the benefit of the contract, without performing that part of it which the projectors undertook that it should perform: that is, in substance, this Court treats the projectors for that purpose as agents of the Company so afterwards called into existence.

The plaintiff says, that, according to this doctrine, the

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contract of the 5th of February, 1846, is binding on the defendants. The defendants object on two grounds: first, they say they are not the parties for whom Harper and Yates were acting; and secondly, that they have not taken the benefit of the contract.

On the first point, I think that the defendants clearly are the parties, within the principle of the rule of equity, on whose behalf Harper and Yates must be taken to have made the contract. It is true, that it was originally made on behalf of a different body; but the promoters of the two rival lines afterwards coalesced and agreed to concur in obtaining an Act for a Railway which should follow that part of the line contemplated by the former Company, which traversed the plaintiff's lands, and should for that purpose (*inter alia*) adopt the contract of Harper and Yates. The plaintiff, on the faith of this, withdrew his opposition. I think this puts matters exactly in the same position, as if the contract had been between the plaintiff of the one part, and Harper and Yates as agents for the Company, which was afterwards incorporated, that is, the defendants, of the other part. The same persons who entered into the agreement as projectors also obtained the Act which passed. Others, it is true, concurred with them, and the name of the Company was changed, but in substance, as far as the plaintiff was concerned, that made no difference. The projectors, who made the contract with him, united with others; and then the united projectors adopted the original contract, and the plaintiff thereupon abstained from opposition. I think this clearly entitled the plaintiff to look to the defendants as the parties liable to him, that is, as the parties on behalf of whom Harper and Yates made the contract. The case of *Stanley v. The Chester and Birkenhead Railway Company* (a), is strongly in point, if, indeed, authority is necessary.

The real difficulty lies in the second point, whether the defendants have in fact taken the benefit of the contract. This depends on the construction to be put on it. If the

(a) *Ante*, Vol. 1, p. 58.

meaning of the contract is, that, in consideration of the plaintiff's assenting to the bill, the defendants, on obtaining their Act, would pay him the two sums of 1000*l.* and 4000*l.*, or either of them, then they have had the benefit of the contract, for they have bought off the plaintiff's opposition. If the meaning is, that, in case the defendants should obtain their Act, and also require the plaintiff's lands, the plaintiff would sell to them what they might require at the price and on the terms stipulated in the contract, then the defendants have not had the benefit of the contract, for they have taken no lands. But I think this is not the meaning. It could hardly be, that, if the Company took anything, however small, they were to pay 5000*l.* as the consideration for what they took, otherwise nothing; whereas, there is no inconsistency in supposing that the defendants agreed to pay the 5000*l.*, in case the Act passed, as the consideration for the plaintiff's consent, and as the price of the lands required. The language here is not, it is true, precisely the same as in the recent case of *Bland v. Crowley*, in the Exchequer, to which reference was made in the argument; but I think that, in substance, it means the same thing, that is, the consideration in both cases was made up in part of the assent of the landholder to the passing of the Act. The value of that assent could not, from the nature of things, be nicely or accurately calculated; there was, therefore, nothing anomalous in stipulating for a fixed sum to be paid for the benefit of that assent, including also what was matter of lesser moment, viz., the price of the land through which the Railway should pass, whether for that purpose more or less might be required. But it could hardly have been intended, that, without reference to the advantage of obtaining the plaintiff's assent to the bill, the Company should, before they got their Act, have stipulated to pay 5000*l.*, if they should take any portion of the plaintiff's lands, whether a single rood or the whole which was delineated on the map. But if, instead of taking any of this

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land, they should just skirt outside the boundary, occasioning probably just as much annoyance to his residence as if they had passed within it, then they should pay nothing. This could not, I think, have been what was intended; and, therefore, the contract must be read as a contract to pay 1000*l.* and 4000*l.* as the price of the plaintiff's assent, and of so much of his lands as should be required for the line, including compensation for what is called residential injury.

It follows from this construction of the contract, that the demurrer must be overruled; for the defendants are, as I have already stated, bound by the contract of Harper and Yates, and they have in fact had the benefit of it. But I must add, that the question as to the meaning of the contract is a mere legal question; and therefore I shall not overrule the demurrer without giving the defendants the opportunity, if they wish it, of taking the opinion of a Court of law on the construction of the contract. This can readily be done; for, if I am right in my construction of the contract, the plaintiff has a present right of action against Harper and Yates. I do not mean that I should direct an action to be brought, but that a case should be stated, the question being, whether, the Act of Parliament having passed, and the defendants having done the acts stated in the bill, the plaintiff has any present right of action against Harper and Yates.

This being my view of the contract, I am not obliged to decide how far the contract to pay the costs of the plaintiff's solicitor would have enabled him to sustain the bill; but I do not think it would. The bill contains no statement as to the nature or amount of the bill of costs, nor any averment that a bill of costs has been delivered, or that payment of it has been demanded or refused. I think this was essential. It would be very oppressive on the defendants to hold them liable for the bill of costs, which has never been delivered; and therefore, independently of the statute which requires the delivery of a signed bill, I

should not have sustained the plaintiff's bill on that ground.

The Court having given the defendants an option of taking the opinion of a Court of law, or having the demurrer overruled, the counsel for the Company declared their intention to take a case for the opinion of the Judges of the Court of Queen's Bench; whereupon the *Vice-Chancellor* said he should suspend his order upon the demurrer, until the opinion of a Court of law upon the legal question had been obtained.

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BEFORE THE VICE-CHANCELLOR TURNER, AND
THE LORDS JUSTICES ON APPEAL.

WEBB v. THE DIRECT LONDON AND PORTSMOUTH RAILWAY
COMPANY.

July 5th &
9th.

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March 5th,
6th, & 25th.

THIS was a claim for the specific performance of an agreement, bearing date the 23rd of July, 1845, and made between C. S. Crowley, B. Baines, and J. Lawrie, three of the promoters of an Act of Parliament for making a railway from the Croydon and Epsom Railway at Epsom to the town of Portsmouth, to be called The Direct London and Portsmouth Railway Company, on behalf of themselves and all other the promoters of the said Act, of the one part; and the plaintiff P. B. Webb, of the other part; whereby the said C. S. Crowley, B. Baines, and J. Lawrie, for themselves, &c. agreed with the said P. B. Webb as follows:—First, that the Company to be incorporated under the said Act of Parliament, when passed, shall, at their own costs and charges, build in a substantial and workmanlike manner a bridge over the said Railway, between the points A. and B.

The promoters of a projected Railway Company, previously to obtaining their Act, entered into an agreement with A. to pay him 4500*l.* for a portion of his land, not exceeding eight acres, and for consequential damage; and A. agreed to withdraw his opposition to the bill. The projected Company, having been incorporated by Act of Parliament, confirmed the agreement by

indenture under their seal. The Railway was afterwards abandoned, and the powers of the Company to take land compulsorily ceased. No part of A.'s land having been taken or being required for the Railway, he filed his claim for specific performance of the agreement:—*Held*, by the Lords Justices, overruling the decision of the Vice-Chancellor *Turner*, that, the claimant having the ready means of obtaining complete redress at law, his claim be dismissed, without prejudice to his rights in an action at law.

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marked in the plan or map annexed to the agreement, or at such other place as the said P. B. Webb shall by writing direct; and that such bridge shall be of the width of at least sixteen feet, so as to afford a convenient and sufficient carriage way for waggons, carts, and carriages, between the parts of the property of the said P. B. Webb, described in the plan, which shall be divided by the said Railway, and shall for ever thereafter keep the said bridge and road way thereon in repair. Secondly, that the said Company shall deviate from their proposed line as delineated in the said plan, so far to the eastward thereof as to avoid altogether any interference with the piece of meadow land, the property of the said P. B. Webb, or the plantation round the same, distinguished in the said plan by the numbers 152 and 153. Thirdly, that the said Company shall, if empowered so to do, purchase a piece of land, the property of the Dean and Chapter of Salisbury, containing, by estimation, one acre (more or less), which will lie between the said deviated line of railway on the one side, and the said piece of meadow land and plantation numbered 152 and 153, and the piece of land in the said plan marked 35, on the other side, and, immediately on such purchase being completed, shall convey the same at their own costs and charges to the said P. B. Webb, his heirs or assigns, or as he or they shall direct, for a nominal consideration. Fourthly, that the said Company shall build, in a substantial and workman-like manner, an ornamented archway under their line of railway between the points C. and D., marked in the said plan, so as to continue, by means thereof, the shrubbery walk there, which will be divided by the said railway, and shall keep the said archway for ever thereafter in good repair; and that such archway shall be of the width of ten feet at the least. Fifthly, that the said Company shall allow the said P. B. Webb a crossing over the said railway, where the same shall traverse the land of the said P. B. Webb, on a level, between the points E. and F.; and the said Company shall erect and

keep in repair proper gates on both sides of the said crossing, the gate on the west side thereof to be an ornamental one. Sixthly, that the said Company shall plant with evergreens, or other ornamental shrubs or trees, the western side of the embankments of the said railway, as far as it shall cross the property of the said P. B. Webb described in the said plan. Seventhly, that the said Company shall not erect any fence upon the surface of the ground above the said railway, where the same shall pass in a cutting, except an invisible iron fence; and if any telegraphic communication shall be set up by the side of the said railway, it shall be set up (as far as the same may be practicable) so as not to be within view from the mansion-house or pleasure grounds of the said P. B. Webb. Eighthly, that the said Company shall not erect or build any station or other building on any part of the lands of the said P. B. Webb described in the said plan, which may be seen from the said mansion-house or the grounds surrounding the same. Ninthly, that the said Company shall not enter upon nor deposit spare or refuse earth or materials, or any other thing, on any of the said lands of the said P. B. Webb described in the said plan (except such as shall be taken by the said Company for the site of the said railway) for any purpose whatsoever, without the consent in writing of the said P. B. Webb. Lastly, that the said Company shall pay to the said P. B. Webb the sum of 4500*l.*, together with his costs, charges, and expenses incurred up to the day of the date of the agreement, by reason of the intended formation of the said Railway (not exceeding the sum of 180*l.*), before the Company shall enter on any of the lands of the said P. B. Webb for the purpose of making the said Railway; and that all timber and other trees on the lands to be taken by the said Company shall be the property of the said P. B. Webb. And it is hereby declared, that the said sum of 4500*l.* is to be the purchase-money for the said lands so to be taken by the said Company as aforesaid for the formation of their Railway, not exceeding eight acres,

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according to such deviated line as aforesaid across the property of the said P. B. Webb described in the said plan, and for the consequential damage to such property.

A memorandum of the same date, written at the foot of the agreement, and signed by C. J. Woods, the plaintiff's agent, was in the following words:—"It is understood and agreed by and between the parties abovenamed, that, in the event of the Act of Parliament referred to in the foregoing agreement not being obtained, the agreement for purchase hereinbefore contained shall be null and void."

This agreement was, after the passing of the Act incorporating The Direct London and Portsmouth Railway Company (9 & 10 Vict. c. lxxxiii., which received the royal assent on the 26th of June, 1846,) ratified and confirmed by a certain indenture, dated the 5th of April, 1847, expressed to be made between The Direct London and Portsmouth Railway Company, established and incorporated by The Direct London and Portsmouth Railway Act, 1846, of the one part, and the plaintiff of the other part, and to which indenture the Company affixed their common seal. It was witnessed, that the Company, in consideration of the withdrawal of the opposition of the said P. B. Webb to the therein mentioned bill, did thereby ratify and confirm the said agreement of the 23rd of July, 1845, made on their behalf by the said C. S. Crowley, B. Baines, and J. Lawrie, and did thereby for themselves, their successors, and assigns, covenant with the said P. B. Webb, his executors, &c., that they the said Company, their successors and assigns, would in all things perform, fulfil, and keep the covenants and agreements entered into in the said agreement by the said C. S. Crowley, B. Baines, and J. Lawrie. And the said P. B. Webb, in consideration of the covenant thereinbefore entered into by the said Company, did thereby discharge and release the said C. S. Crowley, B. Baines, and J. Lawrie, their heirs, executors, &c., from the observance and performance of the covenants and agreements in the said agreement contained, and on the part of the said Company

to be observed and performed, and from all liability whatsoever in respect of the said agreement so entered into by them as aforesaid; and the said P. B. Webb, his heirs, executors, &c., did thereby covenant with the said Company, their successors, and assigns, that he had not done or permitted any act, matter, or thing, whereby he would be prevented or hindered from discharging or releasing the said C. S. Crowley, B. Baines, and J. Lawrie from the said agreement.

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The claim stated that the plaintiff P. B. Webb had, prior to the date of the agreement, incurred costs, charges, and expenses, by reason of the intended formation of the Railway, amounting to more than 150*l.*; and that he had applied to the Company specifically to perform the said agreement; but that they had not done so; and the plaintiff therefore claimed to be entitled to a specific performance of the said agreement; and he thereby offered specifically to perform the same on his part.

The affidavit on behalf of the plaintiff, after confirming the statements contained in the claim, set forth a letter of the 6th of July, 1846, addressed by the secretary of the Company to the plaintiff, acquainting him that the Company had desired their engineers to set out on the ground the line of the Railway, and the land required for its construction forthwith, in order that the works might be commenced without loss of time; and also a letter of the 7th of August, 1846, from the Company to the plaintiff, giving him notice that they would, by their engineers, surveyors, agents, and servants, after three days from the service thereof, enter upon his land, for the purpose of surveying and taking levels of such land, and of probing or boring to ascertain the nature of the soil, and of setting out the line of the works, and referred to the 24th section of the Railways Clauses Consolidation Act, by which a penalty of 5*l.* would be inflicted on any person obstructing the Company, for every such offence.

That, in pursuance of the notices given, entry had been

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made on the land of the plaintiff by the Company's servants, and the line of the Railway had been marked out, and divers trees and parts of fences removed by or on the behalf of the Company.

It did not appear that the Company had done more than enter on the plaintiff's land for the purposes of surveying and taking levels, and they expressly denied that they had otherwise taken possession of it.

It further appeared, that the Company, not having succeeded in raising sufficient funds, abandoned the construction of the Railway; that the powers of the Company to take land expired on the 26th of June, 1849; and that, save some detached portion of the Direct London and Portsmouth Railway, which had been constructed by the Reading, Guildford, and Reigate Railway Company, and by the Chichester and Portsmouth Railway Company, under powers given to them by their own Acts of Parliament, and by the Act of Parliament of the Direct London and Portsmouth Railway Company, no part of the Direct London and Portsmouth Railway had been constructed or commenced to be constructed.


The *Solicitor-General* and Mr. *Moxon*, for the plaintiff, contended, that this was an absolute contract for the purchase of the plaintiff's land; that the plaintiff had actually performed his part of the contract, by withdrawing his opposition to the bill, and by leaving his land at the disposal of the Company. That the Company had adopted the contract by entry on the land under the agreement; and that they were bound, on the passing of their Act, to complete it by selecting eight acres and paying the purchase-money.—They cited *Preston v. The Liverpool and Manchester Railway Company* (a), and *Bland v. Crowley* (b).

Mr. *Bethell*, Mr. *Malins*, and Mr. *Bovill*, on behalf of the

(a) Ante, p. 1.

(b) Ante, Vol. 6, p. 756.

Company, contended, that the terms of the agreement shewed that it was conditional on the land being required for the purposes of the Railway, and in that event only. That the construction of the Railway had been stopped by the injunction granted by the Master of the Rolls in the case of *Cohen v. Wilkinson* (a), and the land could not be taken for the only purpose contemplated in the agreement. That the time allowed to the Company for taking land had expired; and that the decree of the Court could not, in opposition to the Mortmain Acts, enable the Company to hold land, or if they attempted to sell it, to make a good title to a purchaser. That in any event the land must remain the property of the plaintiff. That the entry by the Company was solely under the provisions of the Lands Clauses Consolidation Act, of which the plaintiff must have been well aware at the date of the agreement. That if the plaintiff was entitled to compensation for that entry, he must get it under the Lands Clauses Consolidation Act, and not under the agreement. That the Court would not enforce specific performance of an agreement for purchase of land where the price was not fixed. That in the present case a sum was fixed for two things, the price of the land and the damage by severance. That, as it was now impossible to ascertain the amount payable in respect of damage which would never occur, it was also impossible to ascertain the price of the land. That, in the case cited on behalf of the plaintiff, the price was determined, and the difficulty which was involved in the present did not exist. That the Court would not compel specific performance of an agreement entered into through inadvertence, oversight, or mistake: *Harnett v. Yielding* (b), *Kimberley v. Jennings* (c). That damages at law would fully satisfy the justice of the case, and that a Court of equity ought to leave the plaintiff to his legal remedy.

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(c) Ante, Vol. 5, p. 541. (b) 2 Sch. & Lef. 554. (c) 6 Sim. 340.

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The *Solicitor-General* in reply contended, that the agreement was absolute on the part of the Company, and was not to depend on the construction of the Railway; and that the consideration on the part of the plaintiff was the withdrawal of his opposition to the bill. That, although the Company could not take lands compulsorily, they could under the powers of the Lands Clauses Consolidation Act take lands by agreement; and by the 127th section of that Act, they might sell superfluous land at any time within ten years from the passing of their Act. That, by the 19th section of the Railway Abandonment Act (13 & 14 Vict. c. 83), it was provided, that nothing therein contained should extend to release Companies from any liability to purchase land, where the agreement was part performed, or the purchase money was fixed by contract.

The VICE-CHANCELLOR [after stating the agreement and facts of the case:]—Four points have been urged by the Company in opposition to this claim: First, that the agreement was conditional on the Company requiring the land for the purpose of making the Railway; and that, the land not being required for that purpose, there is no agreement with the purchasers; secondly, that the 4500*l.* was the sum to be paid as the price of the land, and for consequential damage; and it being impossible to distinguish the price of the land from the sum to be paid for consequential damage, the Court cannot decree a specific performance of the agreement to purchase the land; thirdly, that the powers of the Company have ceased, and that they cannot now take the land; and fourthly, that the hardship of the case ought to preclude the Court from decreeing specific performance.

The first point depends on the construction of the whole agreement, and not upon any particular clause. If the construction contended for by the Company is the right one, the agreement would be, in effect, an agreement

for the purchase of the right to take the land, and not for the purchase of the land itself; it would be, that, if the Company take the land, they would give 4500*l.* for it and for the consequential damage. This is not a very probable contract for a landowner to enter into, and on the faith of it to give up his opposition to the bill; but of course it might be so: the question to be considered is, whether it is so or not. Now, if this had been the meaning of the agreement, all the provisions of it would, I think, have been framed to effectuate it; but this is not the case. The provisions to build the bridge and to make the archway are absolute, and depend on no contingency; and in order to build that bridge and archway, the land must have vested in the Company. The last clause on which the argument is founded, too, could hardly be intended to be conditional as to the costs; the construction is not a necessary one, it is arrived at by considering the clause as to the payment of the 4500*l.* to over-ride the whole of the agreement. I see no reason for this construction. It may well be, that the latter part of the agreement, "it is hereby declared that the said sum of 4500*l.* is to be the purchase-money for the said land so to be taken by the said Company as aforesaid for the formation of their Railway, not exceeding eight acres, according to such deviated line as aforesaid across the property of the said P. B. Webb, described in the said plan, and for the consequential damage to such property." It may well be, I say, that that part is independent of the other, and then the clause which is said to override the whole agreement becomes a clause making the 4500*l.* payable before the Company enter on any of the land in question. Having regard to the other clauses of the agreement, and the provision as to costs, I am of opinion, that that is the sound construction of the agreement; the defendants' first point, therefore, cannot be maintained.

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It is then said, that the 4500*l.* was both for land and consequential damage, and that the Court will not enforce the agreement, because no distinct price is fixed for the land. But this is not a case for compensation under the Act of Parliament: for, there, compensation is a separate and distinct subject-matter; but it is merely an agreement by the plaintiff to accept a certain sum in full for the purchase, and for all damage which he might sustain by the use the Company were about to make of the land. And surely it cannot be maintained that the Company are to be discharged from the contract, because they are unable to use the land for the purpose which they contemplated. The substance of the agreement is the purchase of the land. The damage to be done is an incident of the purchase; and I cannot hold that the substance of the agreement is defeated as to the vendor, because the incident fails by the default of the purchaser. I think, therefore, the second point cannot be maintained.

The third point raised was, that the Company could not take the land now; but I expressed a strong inclination of opinion on this point during the argument, and I see no reason to change that opinion. The argument was founded on the Company's private Act, (section 52); by which it is enacted, "that the Railway shall be completed within five years from the passing of this Act; and on the expiration of such period, the powers by this or the recited Acts granted to the Company for executing the Railway, or otherwise in relation thereto, shall cease to be exercised, except as to so much of the Railway as shall then have been completed." Now this clause, as I think, merely takes away the powers granted to the Company, and does not affect their obligations. It was argued, that one of their powers was to take the land, and that this power is gone; but the answer to that argument is, that they have actually taken the land by the contract, for by it they have become in equity the owners; that they have a right in the

land, and not merely a power to take it; and that the Act does not take away the right. A different construction would put an end to all the contracts of all the railway companies throughout the kingdom whose railways have not yet been completed; that is, in all cases where the time, as limited by these Acts, has expired.

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With respect to the fourth point, the case of hardship. I see no ground whatever on which I can refuse to interfere. The Company entered into the contract with their eyes open; they have had some benefit from it by the withdrawal of the opposition to the bill. There is nothing whatever to shew that the agreement was not originally a perfectly fair one; and, if I refused a decree on the ground of their subsequent inability to complete the Railway, I must refuse it in every case in which a purchaser finds that he cannot effect the purpose for which he entered into the contract.

The decree, therefore, I make, will be to declare, that the agreement of the 23rd of July, 1845, was not conditional on the land therein mentioned being taken for the purpose of the Railway, according to the true construction of that agreement, and that Crowley, Baines, and Lawrie thereby agreed absolutely to become the purchasers of the land, and to give the sum of 4500*l.* for the same, and for all damage which might be occasioned to the property of the plaintiff, in consequence of the same being taken for the purpose of the then intended railway; and to declare, that, by virtue of the indenture of the 5th of April, 1847, the Company are bound by the agreement of the 23rd of July, 1845; and to declare the plaintiff entitled to have the agreement specifically performed and carried into execution; and to refer it to the Master to inquire as to the title to the land comprised within the limits of deviation.

The Solicitor General.—In cases where parties resist specific performance altogether, not upon the question of title,

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it is the custom, if the Court decide against them, to give costs up to the hearing.

The VICE-CHANCELLOR.—No, I think not; I hope these parties will now arrange and come to a settlement.

The parties having failed to come to a compromise, the Company appealed from the decision of the Vice-Chancellor.

Sir *W. P. Wood* and Mr. *Moxon* for the claimant.

Mr. *Bethell*, Mr. *Malins*, and Mr. *W. J. Bovill* for the Company.

Mr. *Moxon* replied.

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CRANWORTH, L.J.—Since this matter was brought before us, both my learned Brother and myself have had ample opportunity of considering the question, and, having formed a strong opinion upon this case, we think it is not useful to detain the parties, but purpose to give our opinion at once.

This is a claim, the object of which is to get the specific performance of a contract, or alleged contract, contained in a deed of covenant entered into by the defendants. The deed of covenant is binding on the parties who entered into it, namely, this Railway Company, to carry into execution certain articles of agreement, or alleged articles of agreement, entered into by three gentlemen, Crowley, Baines, and Lawrie, with the plaintiff, on the intended formation of the Company. Now, what the plaintiff says is, that, according to the true construction of that instrument, those three gentlemen bound themselves, among other things, to pay to him the sum of 4500*l.* by way of purchase-money, for any eight acres of his land lying within certain limits, which the Company should think

fit to take, for the purpose of making a railway. That the 4500*l.* was to be accepted by him as the purchase money of the land from the Company, and as the consideration for the consequential damage to his property. The plaintiff contends, that that instrument amounted to an absolute contract. That the defendants, the Company, after they had been incorporated by Act of Parliament, entered into this deed, which they thereby bound themselves to adopt as their contract; and upon this condition, the plaintiff released the contracting parties to the original deed, and now he asks, as against these defendants, specific performance of that which he alleges to be the contract—to purchase his property.

The first question, and a very important one is, whether there is any contract at all? Upon the view we take of this case, it does not become necessary for us to give any positive opinion upon that subject. In the case which came before me, when Vice-Chancellor, to which I have been referred, of *Preston v. The Lancaster Railway Company* (a), I see by the note at the end that I gave the parties the opportunity of trying the question—it being merely a legal one—by taking the opinion of a Court of law upon it. I do not apprehend that I had myself any sort of doubt about that contract, and that can afford no authority for the present case—I mean that part of the present case which consists of the doubt whether the contract was entered into at all. No doubt, if the Railway had been formed, and the land taken, there was a contract that would have bound the parties; but the Railway not having been formed, the question is, whether, under the circumstances, the contract to purchase ever arose. On the part of the plaintiff, it is said that the construction must be, that there was a contract; on the part of the defendants,

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it is said, that that is not the reasonable construction; that, if there was no Railway, there was no contract to sell or purchase at all; and, although some of the preceding clauses of the agreement appear to be absolute in form, such as that they shall make a bridge over the Railway, and that they shall do certain acts connected with the Railway, yet the construction of the contract seems to me a matter at all events of very doubtful nature. Assuming, for the purpose of the argument, and that only—that the contract is such an one as has been contended for by the plaintiff—namely, that the agreement of the defendants under their seal was to the effect, that they would select a portion of the plaintiff's land lying within certain limits, not to exceed eight acres, and take it for the purpose of the Railway, and pay him 4500*l.* as the purchase-money for what they should so take; was it such a contract, as that the plaintiff is entitled to a decree for the specific performance of it?

Now, it is the plain A. B. C. doctrine of this Court, that it will not upon every contract interfere to decree specific performance. It does so, to give more complete justice to a party who seeks the aid of this Court. Where a party has entered into a contract to purchase an estate, it may often happen that the mere legal remedy of recovering damages for the non-performance of the contract would afford very inadequate relief; and, from the earliest time, it has been the doctrine of this Court to interfere, to make the party do that which he has engaged to do, namely, convey the land he has agreed to sell. Whether, in order to give a corresponding remedy on the other side, or for what other reason, we need not stop to inquire; but, undoubtedly, the same relief is also given, unless there be some grounds against it, to the vendor, who seeks merely to have the purchase-money. There, no doubt the Court will interfere; but, in the case of a suit by a purchaser, if there be

circumstances rendering it unjust, the Court will not interfere, even in his favour; and I should say much more readily will the Court listen to an objection made against a vendor seeking specific performance than against a purchaser, because of necessity the vendor can get complete relief at law.

Now, looking at that principle, let us see whether this is a case in which we ought to interfere.

I suppose the instrument to amount to a contract, such as the plaintiff alleges it to have been. I think this is not only not a case in which we ought to interfere, but it is one in which, if we were to do so, we should be exactly reversing the order of things, and making the machinery of the Court instrumental in doing injustice instead of justice, because the only relief we could give would be to decree the payment of the 4500*l.*; but here it is admitted that what the contract amounts to is really this, a contract to select eight acres of the plaintiff's land, and take it from him, and for those eight acres and other consequential damage to pay 4500*l.*

Now, what the plaintiff would have to do at law, as I believe, would be to state this contract, and to state the default, the breach of the contract on the part of the defendants, which will be their not having taken the eight acres of land, and so not having done, of course, consequential damage, and not having paid the 4500*l.* The amount of damage to be then calculated will, as I conceive, be a calculation made on the aggregate, which, taking all these circumstances into consideration, will do justice; whereas the relief that would be afforded in this Court would be a positive injustice—would be giving to this plaintiff 4500*l.* as the purchase-money for that which they have not taken, and which, I believe, now they never can take—I do not wish to commit myself on that subject—it may be that they might take it, and sell it; at all events, it is one

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of those cases in which, assuming the instrument to amount to what the plaintiff says it does amount to, viz. a contract to pay 4500*l.* by way of purchase money and compensation for damage to be done to other land, he has the ready means of obtaining complete redress at law; and we think to that redress he ought to be left. Our opinion is, that this claim ought to be dismissed; but we do not think that, under the circumstances, it should be dismissed with costs.

The counsel for the plaintiff then asked that the appeal might be dismissed without prejudice to the plaintiff's right of action.

Lord *Cranworth*, L. J., having assented to this, Lord Justice *Knight Bruce* said, I should have thought that the obscurity of the agreement was alone a bar to a decree for specific performance. I do not, however, intimate, that that is the only reason; on the contrary, I concur in the judgment which has just been delivered.

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BEFORE THE MASTER OF THE ROLLS, AND
THE LORDS JUSTICES.LORD JAMES STUART *v.* THE LONDON AND NORTH WESTERN
RAILWAY COMPANY. *Feb. 21st*

IN this case, Lord James Stuart, O. T. Bruce, and J. M. Macknabb, the devisees in trust for sale and executors of the will of the Marquis of Bute, deceased, on the 18th of June, 1850, filed a claim against the London and North Western Railway Company, stating, that, by an agreement dated the 1st of April, 1847, and signed by Edward Driver as agent for and on behalf of the defendants, The London and North Western Railway Company, the said Company contracted to buy of the then Marquis of Bute certain freehold property therein mentioned, and claiming to be entitled to a specific performance of the said agreement.

The affidavits stated, that, in the year 1846, the London and North Western Railway Company, as well as several other Railway Companies, presented bills to Parliament, to enable them to construct a Railway from Watford, in the county of Herts, to Dunstable. The Railway, as laid down in the Parliamentary plans deposited with the clerk of the peace for the county of Bedford, would pass through proper-

An incorporated Railway Company applied to Parliament for an Act to enable them to make a branch line. A landowner, A., through whose property the proposed Railway would, according to the deposited plans and sections, pass, opposed the bill in Parliament; whereupon the Railway Company entered into negotiations with him, which resulted in certain heads of agreement being drawn up and signed by agents on behalf of both parties, and A.'s

withdrawal of his opposition. The bill passed into an Act in 1847; and soon afterwards, A. tendered a formal agreement to the Company for their execution. A. died in March, 1848, leaving the plaintiffs his devisees in trust. The Railway Company, in the same year, declared their intention of abandoning their scheme for making the branch line; and, after repeated applications, returned the draft agreement, altered so as to make the taking of A.'s land conditional on the formation of the Railway. Nothing further was done; and on the 18th of June, 1850, the plaintiffs filed their claim for specific performance of the heads of agreement. On the 9th of July, in the same year, the powers of the Company to take land compulsorily ceased. The Master of the Rolls *held*, that the plaintiffs were entitled to specific performance of the heads of agreement entered into before the passing of the Act, notwithstanding the plaintiffs had delayed filing their claim for eighteen months after the defendants' agreement had been returned and the scheme abandoned. The Lords Justices, on appeal, following their decision in *Webb v. The Direct London and Portsmouth R. Co.*, reversed the decision of the Court below, *holding*, that it was not a case for specific performance, on the grounds, that complete relief could be obtained at law, and that there existed no mutuality in the contract; that, independently of these grounds, the laches of the plaintiffs in filing their claim, public policy, and the vagueness of the terms of the contract, prevented the Court from decreeing specific performance.

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ty belonging to the then Marquis of Bute. The Marquis opposed the making of the Railway, and petitioned Parliament against the bill of the London and North Western Railway Company; whereupon Edward Driver, on behalf of that Company, and T. Collingdon, the agent of the Marquis, and on his behalf, made and signed certain heads of agreement, bearing date the 1st of April, 1847, which were as follows—

WATFORD AND DUNSTABLE RAILWAY.

Heads of Agreement for the purchase of the Marquis of Bute's Land, required by the above Railroad, 1st April, 1847.

No. 1. Nos. 97, 98, 93, 101, 102, and 103.

A. 400*l.* per acre for the land required, and the severed portions to south of Railway, and 100*l.* in addition, for making road.

Passenger archway under the Railway between Nos. 97 and 98; and right of footway alongside of river from archway to No. 103.

No. 2. Nos. 108, 108a, 108b, 109, 109a, 109b, 117.

B. 1250*l.* per acre for "7 acres," extending from Love-lane to the street called North-street, and from the Hitchin-road to the road to High Town, and the intervening roads to be measured in. If, under the powers which Lord Bute and the Company possess, such intervening roads (except in front of the houses built at the corner of Bute-street) cannot be stopped up, 1,300*l.* per acre to be given for the above quantity, except all to the east of Bute-street.

No. 3. Nos. 125, 126, and 129, 130, 137, and 138.

C. 400*l.* per acre for the land required. The whole of 129 and 126 down to and inclusive of the proposed diversion of the road, to the north side thereof.

The diverted road to be thirty feet wide, and made in a good and substantial manner.

The severed portions of 130 and 137 to the north, and the whole of No. 138, to be taken at the same price. The footpath for the use of the miller, six feet wide, to be given along south side of river, and the mill-tail to be preserved, and a culvert for the overflow from the mill-head to the Bedford-row in its present course.

No. 4. Nos. 164, 166, 167, 169, 149, 158, 161, 163, 172, 172a, 174, 176.

D. 250*l.* per acre for the land required.

1000*l.* for depreciation of homesteads. The road No. 166 to be preserved, and a road, the width of the road 172a to be given on the south side of the Railway from 166 to 172a; the roads Nos. 166 and 172a to be measured in, and a road 18 feet wide to be made on north

side of Railway, from 160 to south west corner of 163 in the place of 160.

The above prices refer to the quantities of land required for the Railway, and to the contents of the roads and severed portions which are respectively to be accurately measured; Lord Bute to have the first refusal of all severed lands purchased by the Company of other proprietors when such severed lands adjoin his Lordship's property. The tithe rent-charge and land-tax to be apportioned and borne by the Company. The Company to supply all necessary culverts for proper drainage of the same, to be built by the Company, and also all necessary communications. The same prices per acre to be given for the adjoining portions, if required by the Company.

Signed { Edward Driver, Agent for Railway Company.
T. Collingdon, Agent for the Marquis of Bute.

Witness (Signed) W. Gascoigne Roy.

It is expressly understood that all the premises comprised in the sections A. C. and D., are only held by yearly tenants, so that the Company shall have no other interest to negotiate for; and that the tenants of the cottages and gardens in section C. are considered to be monthly holdings, and those in section B. are in the hands of Lord Bute; and that all the tenancies are commencing at Michaelmas.

The numbers and letters in the draft "heads of agreement" referred to the numbers and letters inscribed in the deposited plans and sections, a copy and drawing of which, so far as they affected the property of the Marquis of Bute, were annexed to the "heads of agreement."

The London and North Western Railway Company obtained an Act of Parliament, which received the royal assent on the 9th of July, 1847, for the formation of the branch line within five years; and, on the 1st of September in the same year, the solicitors of the Marquis forwarded to the solicitors of the Railway Company a formal agreement, requiring execution. The draft agreement, so prepared, was accompanied by a letter, requiring the solicitors of the Railway Company to effectuate the heads of agreement of April, 1847. The Marquis died in March, 1848, and by his will appointed the present claimants his devisees in trust. On the 14th of October, 1848, the Railway Company served a notice on the claimants of their intention

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to abandon the proposed scheme. The solicitors of the plaintiffs made frequent applications to the solicitors of the Company for the return of the draft agreement; and, in answer to one of such applications, the solicitors of the Company wrote as follows:—"We are not aware of having heard from you, on the subject of the draft agreement, since the death of the late Marquis; and there being no present intention on the part of the Company to make the line, we certainly have not considered the settlement of this draft as a matter very urgent."

Further correspondence passed between the parties, but the draft agreement was not returned until the 7th of December, 1848; and, when so returned, was altered in red ink, by the insertion, before every clause containing an absolute agreement to purchase the lands therein mentioned, the following condition:—"In the event of the said Company determining to make that part of the Railway, by the said Act authorised, which affects the lands next hereinafter described, within the period thereby limited for the compulsory purchase of lands, and in that event only." A correspondence then took place between the solicitors of the devisees of the Marquis, and the solicitors of the Company, the plaintiffs expressing their surprise at the alterations made in the draft agreement, and the Railway Company declaring, that the heads of agreement had been only entered into conditionally, on the land being required for the purposes of the Railway.

On the 9th of February, 1849, the solicitors of the Railway Company, by letter, expressed their intention to abide by the alterations made in the draft agreement; and on the 17th of June, 1850, in reply to a letter written by the solicitors of the plaintiffs, the solicitors of the Company wrote as follows:—"We beg to say that we have not heard of any occurrence relating to the matter since the date of our letter of the 9th of February, 1849, and have no alternative but to adhere to the opinion which we then entertained."

The correspondence between the parties having thus terminated, on the following day the plaintiffs filed their claim.

The affidavits in support of it stated—That the Marquis had petitioned the House of Commons against the bill, but had withdrawn his opposition upon the signing of the “heads of agreement.” That the heads of agreement were prepared with the view of an unconditional sale of the land by the late Marquis to the Railway Company, upon the Act passing; and with the view of being carried into execution by means of a formal agreement, on the Company obtaining their parliamentary powers. That the several figures in the “heads of agreement,” had reference to corresponding figures in the plan deposited with the clerk of the peace, and were referred to in the Act of Parliament. That the plans annexed to the heads of agreement were exact copies of the parliamentary plans, and had, in addition, marked and coloured blue thereon by the agent of the Company, the exact superficial area of the base of the proposed Railway through the lands of the late Marquis; and the plans denoted, so far as the numbers were concerned, the various pieces of land which were required for the purposes of the proposed Railway; and that all the numbers referred to property of the late Marquis; and that such portions of land as were coloured blue, had been accurately measured by the agent of the Company.

The powers of the Company to take land compulsorily expired on the 9th of July, 1850; but the time limited for the construction of the line did not expire until the 9th of July, 1852.

The affidavits filed on behalf of the Company stated, that the writ of summons in this cause was dated the 18th of June, 1850; and that the claim had been set down and come on for hearing on the 27th of July, 1850, when it was ordered to stand over until the then next Saturday, in order that the plaintiffs might file affidavits; and that, on

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the 3rd of August, the claim came on again to be heard, and was again, for the same reasons, ordered to stand over until the Michaelmas Term following. That, on the 8th of November, 1850, the said claim again came on to be heard, and was again, for the same reason, ordered to stand over until the 23rd; and was again, and on the 14th of January, 1852, ordered to stand over until the 24th. That between the 18th of June, 1850, and the 21st of January, 1852, no affidavit had been filed on behalf of the plaintiffs, nor any other proceedings than those mentioned taken in the suit. That the Railway Company had wholly abandoned and given up all intention of making or attempting to make the projected branch line, and did not require the plaintiffs' lands. That the only opposition to the defendants' bill in the session of 1847, was that of the Marquis of Bute and certain other landowners; and that the opposition of the Marquis had been withdrawn in consideration of the defendants, by their agents, agreeing to pay him for such of the lands mentioned in the agreement, as they might require to purchase for the Railway and works, if made, at the price mentioned in the "heads of agreement." That the heads of agreement had not been prepared or signed, as an unconditional agreement by the Railway Company to purchase any of the lands of the Marquis, the arrangement being made subject to the Railway Company requiring the lands for the purposes of the Railway and works, and the sole object being to indemnify the Marquis against any damage or injury he might sustain in case the Railway was made.

T. Driver, the agent, who had signed the heads of agreement on behalf of the Company, by his affidavit stated, that he was not authorised by the Company to enter into any contract for the purchase of land, except for the purpose of making the projected Railway; and that, in the negotiations with the agent of the plaintiffs, no restrictions whatever had been suggested as to the right of the Com-

pany, in the event of their obtaining their Act, to make the projected line over any lands within the limits of deviation.

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The claim now came on to be heard before the Master of the Rolls.

Mr. *Roundell Palmer* and Mr. *Macnaughten*, for the plaintiffs, contended, that the contract for the purchase was unconditional on the part of the Company, and was even stronger than the case of *Webb v. The Direct London and Portsmouth Railway Company (a)*. That the contract had been in part performed by the Marquis, by the withdrawal of his opposition to the bill; and that he had been prevented from dealing with his lands in any manner since the heads of agreement had been entered into. The case of *Preston v. The Liverpool, Manchester, and Newcastle Railway (b)*, was also cited.

Mr. *Willcock* and Mr. *Speed*, for the defendants, the Railway Company, contended, that the whole ground of the Marquis' opposition in Parliament was the injury which he would suffer by the formation of the Railway; that that injury not having been inflicted, there was no longer a question of compensation. That the offer by which he had been induced to withdraw his opposition to the bill supposed the infliction of injury. That he was to have one of two things, either his estate untouched, or an equivalent for any damage. That the affidavits shewed, that the Company had now abandoned their scheme, and the ground of the opposition of the Marquis had been removed. That the Company were not bound to pay a price for leaving the owner in the undisturbed possession of his estate, which appeared to be the object of the Marquis' opposition.

(a) See the preceding case.

(b) Ante, p. 1.

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That the defendants had not, at the time of entering into the contract, any power to make anything but a conditional bargain. They could not employ the funds of their shareholders for any purpose not authorised by the London and North Western Acts; and that the funds of the Company, when the Act was obtained, could only be applied for the purposes of the projected railway scheme: *East Anglian Railway Company v. The Eastern Counties Railway Company* (a). That the contract was not one which could be wholly carried out, and the Court would not enforce it partially. That, in this case, there were many things which could not be ascertained, unless the land were actually taken: viz., the quantity of land which would have been required if the Railway had been actually made, and the compensation for severance and for damage to homestead. That, in the cases cited, there was a contract for the payment of a specific and definite sum; but in this, the purchase-money was left to be ascertained. That, in the present case, the defendants were an incorporated Company, existing only and acting under certain provisions of an Act of Parliament, and had not the individuality of promoters of a projected Company. That the plaintiffs had lost their right to equitable relief by their laches; that they were aware of the abandonment of the projected line in 1848, and did not file their claim until a few weeks before the powers of the Company to take land compulsorily had expired, and did not bring it to a hearing until after it was impossible for the Company to form their proposed line of Railway: *Moore v. Blake* (b), *Heaphy v. Hill* (c), *Walker v. Jeffreys* (d), *Watson v. Reid* (e). That the Court could not, in the present case, compel specific performance; for it could not confer any power on the Company to take the land. They could not hold it, as it was not required

(a) Reported post.

(b) 1 B. & B. 69.

(c) 2 S. & S. 29.

(d) 1 Hare, 348.

(e) 1 Russ. & My. 236.

for the purposes of the Railway; neither could they sell it, as they could give no title to a purchaser. That, by the 127th section of the Lands Clauses Consolidation Act, the Company were bound to sell all lands acquired by them, and not wanted for the purposes of their Railway, within the period prescribed for the completion of the line, and, if not sold within that period, they vested in and became the property of the owners of the lands adjoining thereto. That, in the present case, if specific performance were decreed, there would be this anomaly, that the vendor would have not only the purchase-money, but the land too: ——— v. *White* (a), *Clarke* v. *Moore* (b).

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The MASTER OF THE ROLLS (without calling for a reply):—
 When this case was opened the other day to me, not being aware of those cases which have been referred to by Mr. *Palmer*, I thought some very serious and difficult questions would arise; but I am totally unable to distinguish it from the case of *Webb* v. *The Direct London and Portsmouth Railway Company*.

In the first place, upon the construction of the contract itself, it appears to me one to be entered into immediately. It is the “Heds of Agreement for the purchase of the Marquis of Bute’s land required by the above Railway.” There is nothing in it saying that it is to be conditional upon the Act passing, or that it is to be conditional upon the Company requiring the land. Upon the face of it, it appears to be an immediate and direct contract. There is a passage in it which is very peculiar, and in which the counsel for the defendants pointed out serious difficulties and inconveniences. The passage I refer to is that in the paper before me marked with the letter “B,” which gives 1000*l.* for the depreciation of homesteads, and refers to certain roads to be made, and certain other

(a) 3 Swanst. 108, n.

(b) 1 J. & L. 728.

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things to be done; but I find in this case of *Webb v. The Direct London and Portsmouth Railway Company*, that exactly the same thing appeared in the contract. In that case there was a clause exactly the same as to what was to be done in case the Company should take the land, and carry the contract into effect; and the Vice-Chancellor *Turner*, after taking a great deal of care, and time to consider, gave an elaborate judgment, in which he states these four points urged by the Company in opposition to the claim, which are four of the points urged before me: first, that the agreement was conditional on the Company's requiring the land for the purpose of making the Railway, and that, the land not being required, there is no agreement; secondly, that the sum was the price for the land and for consequential damage, and that the price for the land cannot be distinguished, and the Court therefore cannot decree a specific performance of the agreement to purchase it, (that is rather stronger than the case of the contract now before me); thirdly, that, the powers of the Company having ceased, they cannot now take land; and, fourthly, that the hardship of the case precludes the Court from decreeing specific performance. Now, those four points (through which the Vice-Chancellor goes at considerable detail in that case), varying a little in some respects, have been the same points which have been urged before me.

First, I do not find upon the face of this contract, assuming it to be established to be a direct contract, such ambiguity or difficulty as to make it impossible to be carried into effect. I have attended carefully to the argument of counsel on this subject; but I have no evidence before me, nor does the contract itself at all induce me to believe that a surveyor, being on the ground with this contract in his hand, could not accurately ascertain what was the land to be taken, and the price to be paid for it. On the contrary, it appears to me "the land required for the Railway" means the land required for the Railway accord-

ing to the then present project for making the Railway; and that is clearly pointed out by the plan. What might be required in case they should make a deviation is also specified, and that was to be taken in a particular way.

There is nothing, therefore, on the face of the contract itself, so far as relates to the three first clauses marked A., B., and C., which appears to me to be at all obscure in that respect. I should have had great difficulty, (not at all wishing, however, to disagree with Sir *George Turner* on the subject), but I should have thought the question one requiring grave consideration, with respect to those matters which were to be done, or were agreed to be done, in the case of the Company forming their line, as to the mode of construing the contract, if it were not that exactly that point arose in the case of *Webb v. The Direct London and Portsmouth Railway Company*, in which the Vice-Chancellor gives a distinct opinion upon the subject, and I think a perfectly good reason for the course which he took. "It is said,"—these are the observations of the Vice-Chancellor,—“that the 4500*l.* was for both land and consequential damage, and that the Court will not enforce the agreement, because no distinct price is fixed for the land; but this is not a case for compensation under the Act of Parliament, for there compensation is a separate and distinct subject-matter; but it is merely an agreement by the plaintiff to accept a certain sum in full for the purchase, and for all damage which he might sustain by the use which the Company were about to make of the land.” The same thing as in this case: for here is a sum to be given for the land, and a sum to be given for damage arising from the use which the Company may make of the land, that is, for the depreciation of the homesteads. The Vice-Chancellor proceeds: “And surely it cannot be maintained, that the Company are to be discharged from the contract because they are unable to use the land for the purposes which they contemplated. The substance of

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the agreement is the purchase of the land; the damage to be done is an incident of the purchase; and I cannot hold that the substance of the agreement is defeated as to the vendor, because the incident fails by the default of the purchaser."

A very material observation, and one which has influenced me greatly in the consideration of this case, is this, that the defendants are the persons who throughout, by their own conduct, raise the difficulties which they interpose as reasons why the plaintiffs should not be entitled to the specific performance of the contract.

I proceed to notice one or two other observations which have been made with respect to objections to my decreeing specific performance of this contract. In the first place, it is said that Mr. Driver had no authority to enter into the contract. Now, I am not satisfied from the evidence that that is so. That he had authority to enter into some contract is evident. He says, that if the contract bears the construction which I am disposed to put upon it, then the contract was beyond his powers; and that that was not the way in which he understood it: but what is conclusive upon it is this, that the Company saw the contract after it was entered into and executed, and they adopted it, and upon the strength of it allowed the Marquis to withdraw his opposition to the bill, and obtained their Act of Parliament; and it is expressly stated in the affidavit of Mr. Parker, that it was in consideration of this contract that the Marquis withdrew his opposition to the bill.

If a person employs an agent, and that agent exceeds his authority, if the principal afterwards permits the person with whom the agent has entered into an agreement to act on it as a binding agreement, the Court will not afterwards allow him to say the agent had no authority to enter into that contract, which he has allowed the other person to act upon, in the belief that it was a contract which

the agent had authority to enter into. There are many cases of contract created by agency, and not by original authority, where the agent without authority has entered into an agreement, and the principal has afterwards adopted it.

One of the next points suggested to me is, that the Company had no power to contract. Now, it is to be observed, the point does not seem to have been raised; but the same point must have arisen if it had been taken in the case of *Webb v. The Direct London and Portsmouth Railway Company*, and also, as it appears to me, in *Preston v. The Liverpool, Manchester, and Newcastle-on-Tyne Junction Railway Company*; because those Railway Companies seem to me, so far as I have been enabled to look into those cases, to have entered into contracts by agreement, and not according to the form prescribed by the Lands Clauses Consolidation Act. But the point was raised in *Hawkes v. The Eastern Counties Railway Company* (a). There the contract which had been entered into, and of which specific performance was decreed by the present Lord Justice *Knight Bruce*, was expressly of a similar description with the present. I am of opinion, therefore, that I cannot on that ground, though it may possibly be fit that all these decisions should obtain the final review of some ultimate Court of Appeal, take upon myself to determine those various questions, which are of considerable moment. I cannot but consider myself bound by these various authorities, which all proceed on the same principle, establishing a right to the specific performance of the contract.

Now, with respect to the laches: I feel no difficulty at all on that question. I admit the principle urged by the defendants' counsel, and think it a valuable one to be insisted on,—and certainly I will not be the first Judge to weaken any of those cases which establish this, that persons

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must pursue their remedies speedily; but in all the cases which have been cited to me, the contract had been distinctly abandoned and given up. But, observe how the matter stands here: The contract is entered into in April, 1847: it is kept till December, 1848, that is to say, above a year and a-half, before it is returned. The defendants cannot well complain of the plaintiffs not insisting upon their sending the contract back to them at an earlier period, for this would be to complain of their own laches. When it is sent back it is said, we considered the contract to be conditional on our requiring the land; and no bill is filed, or no claim is filed, till eighteen months after that period, within a few days of which time the compulsory powers of the Company to take the land ceased. Up to that time the plaintiffs had no notice whatever, but that the defendants might insist on the contract; because, up to that time they had the power of making the Railway; and it is only when they find that the Railway is really to be abandoned, that they file their claim. It is perfectly obvious that the Railway Company might, at any time before the expiration of their powers, have required the land to be taken for the purpose of making the Railway; in which case not only would there not have been no abandonment of the contract on their part, but an actual insisting on it; for, if they had had occasion to take the land, they must have insisted upon the contract being binding. The fact, whether they required the land or not, is not a circumstance that could be ascertained till the expiration of five years after the month of July, 1847, at which time the power of making the Railway ceased; and therefore I am of opinion that the decisions founded on the ordinary case of laches do not apply.

Now, as to the case of hardship, founded upon the argument that if the land be taken it would be useless to the Company, it appears to me totally impossible to give any weight to that observation; for, who is it that has made it

useless? Why, the defendants themselves, who, if they had thought fit, might undoubtedly have made this Railway, and might have done all that which the Act of Parliament enabled and empowered them to do. The ground, that a contract can be put an end to, because one of the parties to it has changed his mind with respect to it, or has made the acquisition of the property contracted to be sold to him a matter of no moment and use to him, would be introducing a most dangerous principle and innovation into the doctrines this Court enforces, with regard to the specific performance of contracts; and I am satisfied that no authority can be produced, to shew that any such principle has been acted upon, at least, in modern times, or that this Court would be justified, in a case of that description, in allowing one party to say to the other, I by my own act have made this useless, and therefore all the remedy you can now get is by damages at law, and not by specific performance of the contract.

The question of hardship was one very much discussed before Vice-Chancellor *Turner* in the case of *Webb v. The Direct London and Portsmouth Railway Company*. He says: "With respect to the fourth point, the case of hardship, I see no ground whatever on which I can refuse to interfere. The Company entered into this contract with their eyes open, they have had some benefit from it by the withdrawal of the opposition to the bill. There is nothing whatever to shew that the agreement was not originally a perfectly fair one; and if I refused a decree upon the ground of a subsequent inability of the defendants to complete their Railway, I must refuse it in all cases in which a purchaser finds that he cannot effect the purpose for which he entered into the contract." Now, adopting all those observations of the Vice-Chancellor, I might in this case go a little further, and say, that I should refuse it in all cases in which the purchaser finds, not merely that he cannot

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effect the purpose for which he entered into the contract, but in all cases in which he has wilfully and intentionally abandoned the purpose for which he entered into the contract, which is a stronger reason for inducing the Court to interfere.

It appears to me, that this is a case in fact governed by authority; and that I am bound to direct a specific performance of the contract, not at all, however, concealing from myself the number of grave questions that arise upon it, in respect of which I am not sorry that I am not called on in the first instance to give my opinion.

Considering the authorities to which I have been referred, which really conclude me upon all the points which have been made, the result is, that there must be a decree for the specific performance of the contract, and a reference to the Master, to ascertain whether a good title can be made.

The counsel for the defendants, the Railway Company, then asked, if there ought not to be a specific direction as to the 1000*l.* which was to be paid for depreciation.

THE MASTER OF THE ROLLS.—I simply decree a specific performance of this contract, not of a part of it, but of the whole. Of course, I cannot decree a specific performance of a portion of the contract.

Decree specific performance of the contract. Refer it to the Master to inquire whether a good title can be made to the several parcels of land agreed to be purchased by the Railway Company under and by virtue of the heads or articles of agreement, dated 1st April, 1849, in the claim mentioned; when such title was first shewn; and if he shall find that a good title was made, then to settle the

proper conveyance, in case the parties differ. Reserve further directions and costs.

The defendants appealed from this decision, and the cause came on to be heard before the Lords Justices. In the mean time, the case of *Webb v. The Direct London and Portsmouth Railway Company* (a) had been heard by their Lordships on appeal, and the decision of the Court below reversed.

Mr. *Roundell Palmer* and Mr. *Macnaghten* for the plaintiffs, in addition to the cases already stated to have been cited in the Court below, relied on *Peacock v. Penson* (b), and *Edwards v. The Grand Junction Railway Company* (c). They also drew a distinction between this case and that of *Webb v. The Direct London and Portsmouth Railway Company* (a), inasmuch as that Company was an insolvent Company, and one that had utterly failed in its purpose and undertaking; but the defendants were an existing and powerful Company, well able to obtain more powers from Parliament, or otherwise to complete their contract.

The Lord Justice *Knight Bruce*, in the course of the argument, asked the defendants' counsel whether, if the Court should decide on sending the case to law, the Company would admit that the contract was under their common seal. To this the counsel for the Company at once assented.

Mr. *Bethell*, Mr. *Willcock*, and Mr. *Speed* for the defendants, the Railway Company, relied on the points made in the Court below; they also cited *Harnett v. Yielding* (d), the principle of which case, they contended, had been adopt-

(a) Preceding Case.

(b) 11 Beav. 355.

(c) My. & Cr. 650.

(d) 2 Sch. & Lef. 553.

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ed by the decision of the Lords Justices in *Webb v. The Direct London and Portsmouth Railway Company*. They also contended, that this was a case for damages at law, and not for specific performance: *Bland v. Crowley* (a) and *Gervois v. Edwards* (b). That the defendants, the Railway Company, although solvent, had no funds at their disposal for the purpose of purchasing land not required for their Railway any more than the Direct London and Portsmouth Railway Company; and that there was no distinction between the two cases. That the agreement was admitted to be conditional: for the plaintiffs, by their affidavit, stated that it was to depend on the passing of the Act; if so, it also depended on the words of the Act what land the Company were to take; and the whole contract was conditional on such taking. That, as the Company had full power to exercise the powers of deviation given by the General Act; and as they might, by availing themselves of those powers, have taken a smaller or larger part of the plaintiffs' land, it was evident that the quantity of land, and consequently the amount of purchase money, were wholly undetermined by the contract. That the contract was not to take the whole of the land mentioned in "the heads of agreement," but such parts only as were required by the Company. Again, that it was impossible to estimate the amount to be paid for consequential damage and severance; and that, for uncertainty alone, this Court could not decree specific performance.

Mr. *Macnaghten* in reply.—The equitable relief granted by a decree for specific performance is discretionary in the Court; and, if it see that there is a sufficient remedy at law, it may leave the parties to their legal remedies. That was the decision in *Webb v. The Direct London and Portsmouth Railway Company* on appeal; but, in the present

(a) Ante, Vol. 6, p. 756.

(b) 2 D. & W. 82.

case, there is no remedy at law: *Bland v. Crowley* (a). The agreement remains, whether the funds now in the hands of the Company are liable or not. The Court will not admit the defence, that they have no money for this purpose; there can be no difference between a Company and an individual. The Company in this case are simply in the character of promoters. If the Company are bound by the contract, they certainly must find the means of performing it. Neither is the validity of the agreement affected by the expediency, whether public or private, of making the Railway. By the contract, they have acquired the power to make it; but they cannot be permitted, after five years, to turn round and say, we do not want your land, and therefore our contract is at an end. Again, it was contended, that, the agent of the Company had only a limited authority to contract on behalf of the Company; but, if that were so, there must be express notice of such limited powers: *Duke of Beaufort v. Neeld* (b). Laches cannot, in this case, be imputed to the plaintiffs, for the Company had power at any time, up to the 9th of July, 1852, to take the plaintiffs' land, and they were and are now ready to complete their part of the contract; besides, in the present case, there has been a part performance by the withdrawal of the opposition of the Marquis of Bute to the bill: *Simpson v. Lord Howden* (c), *Lord Petre v. Eastern Counties Railway Company* (d), *Edwards v. The Grand Junction Railway Company* (e), *Preston v. The Liverpool, &c., Railway Company* (f).

LORD CRANWORTH, L. J.—This case was decided by his Honour the Master of the Rolls, on the authority of that of *Webb v. The Direct London and Portsmouth Railway Company*; not as that case now stands, it having been brought

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(a) Ante, Vol. 6, p. 756.

(b) 12 C. & F. 273.

(c) Ante, Vol. 1, p. 326.

(d) Ante, Vol. 1, p. 462.

(e) Id. 173.

(f) Ante, p. 1.

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by appeal to this Court, but as it was after the decision of it by his Honour the Vice-Chancellor *Turner*. As I understand from counsel, the Master of the Rolls seemed to intimate an opinion, that, but for that authority, his decision might not have been such as in fact it was. If that be so, inasmuch as that case of *Webb v. The Direct London and Portsmouth Railway Company* has since been decided otherwise than it was decided by Vice-Chancellor *Turner*, we have not in fact the duty of substantially overruling any thing that was meant to be decided by his Honour the Master of the Rolls; and we shall be acting in conformity with what might possibly have been his opinion, but for a decision which he then thought binding upon him, though in fact that decision has since been overruled. Now, I confess I think that this is a weaker case than *Webb's case*, so far as the plaintiffs are concerned, inasmuch as it has been offered that this should be put into a train of inquiry at law. It is, perhaps, not necessary, and perhaps not proper, to give any opinion about what the construction of the agreement is; but it seems to me extremely doubtful whether there is any binding contract at all; which doubt also existed in the case of *Webb v. The Direct London and Portsmouth Railway Company*. I will not, however, give any opinion whether there was or was not such a contract.

The ground on which we proceeded in *Webb v. The Direct London and Portsmouth Railway Company* was this—that, whether it was a contract or not, the circumstances of the case made it such that it was not fit for this Court to interfere by decreeing specific performance, because these two circumstances transpired—first, that complete relief might be obtained at law if the parties were entitled to any relief; and, secondly, that the principle of mutuality wholly failed, for it was impossible for the Company to hold the land for their own benefit in consideration of the money which they were to pay.

Now, it appears to me that both these reasons apply precisely in the same way in this case, as they did in that to which I have referred. Even supposing that this contract by Mr. Driver amounted to a positive contract, that, if the Railway Act passed, these specific pieces of land (assuming them to be defined) should be taken and a given sum paid for them—supposing that was so, then another difficulty which the present plaintiffs are in, is this—that it may be a contract, (as was the case in *Webb v. The Direct London and Portsmouth Railway Company*) which was not binding on the defendants; it may have been entered into by Mr. Driver as agent, but he may have had no authority to bind the Company.

The interference therefore of this Court, on the principle of the case of *Edwards v. The Grand Junction Railway Company*, and one or two others, which were decided on the same principle, is not to be entertained. The plaintiffs may be entitled however to some relief in this Court; but to such relief only as will place the parties in the same situation as they were in in the case of *Webb v. The Direct London and Portsmouth Railway Company*, where, in point of fact, the Company, after the Act of Parliament had been obtained, entered into a contract, binding themselves to adopt the agreement entered into by the parties before the Company came into existence.

That is the course which appears to me, and to my learned Brother, proper to be taken, and will be one that will do substantial justice in this case. It was agreed in the outset that the defendants would enter into any admissions or stipulations that might be necessary to enable the plaintiffs to raise the question at law, such as, that the Company will admit that an agreement, dated the 10th of July, 1847, was duly entered into by them under their common seal. The terms, however, of such admissions can be arranged, and the case mentioned again.

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KNIGHT BRUCE, L. J.—Perhaps the time that the plaintiffs suffered to elapse after the passing of the Act in 1847, or, if the time before October, 1848, when notice of abandonment was given, ought not to count, then after October, 1848, before they filed the present claim, in June, 1850, is fatal to it; but, assuming that not to be so, I am unable to view the case as one for specific performance. In the first place, if the parties were reversed, could the defendants, if they had been plaintiffs, have obtained a decree for specific performance?—Against this, probably the mere circumstance of the abandonment of the undertaking, for the purpose of executing which the land in question, or so much of it as in truth was proposed or agreed to be purchased, was required, would have formed an insurmountable objection, and might have disposed of the actual contention; but, independently of any such consideration, I doubt whether, to enforce specifically the terms or any part of the terms of the document before us, of the 1st of April, 1847, would not, in the actual condition of circumstances, be against public policy, or, in other words, contrary to law. But, setting aside this point also, I am of opinion that the language of the document, in the parts of it necessary to be construed and acted upon, if there is to be a decree of any kind for specific performance against the defendants, is too vague, too uncertain, and too obscure to enable this Court to act with safety or propriety for any such purpose. For this vagueness, uncertainty, and obscurity, very possibly the intention of the agents concerned, that a more formal document, not merely by way of conveyance but by way of contract, should be prepared and executed, may account. But, however this may be, the plaintiffs must, I conceive, be left to proceed at law, as they may be advised; they will have the benefit of the admissions for facilitating their proceedings there, which the defendants have made by their counsel.

The form of the admissions and order was finally arranged as follows:—The defendants, by their counsel consenting and undertaking, that, in the event of an action being, before the end of Trinity Term next, brought against them by or for the benefit or under the direction of the plaintiffs, for the purpose of obtaining damages for the breach of the alleged agreement of the 1st of April, 1847, and such action being prosecuted with due diligence, the defendants will, in such action, and for the purposes thereof, admit, that, on the 10th of July, 1847, a deed was duly executed by the defendants under their common seal, whereby they covenanted, for themselves and their successors, with the late Marquis of Bute, his heirs, executors, and administrators, that they would perform all agreements, if any, entered into previously to the 9th of July, 1847, by Edward Driver, acting or purporting to act as their agent, for the purchase of any lands of the said Marquis, to be taken by them for the intended Railway, and for compensation to be made for any damage to be occasioned by the said Railway, in the same way as if such agreements or agreement, if any, had been duly entered into by them under their common seal on the day of the date thereof, and as if they had been duly authorised by law to enter into such agreement or agreements; the defendants also consenting to dispense with profert in such action. Ordered that the claim filed by the plaintiffs against the defendants be dismissed. And any of the parties are to be at liberty to apply to this Court as there shall be occasion (a).

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The Oxford Railway Company previously to obtaining their Act, entered into a provisional agreement with the Great Western Railway Company, under which it was agreed (among other things) that that Company should assist the Oxford Company in obtaining an Act; and that such Act should contain a power to lease their proposed line to the Great West-

ern Railway Company. The Act passed, containing powers to lease and sell the new line to the Great Western Railway Company, and under it the Railway was to be made in all respects to the satisfaction of the engineer of that Company, and to be formed of such gauge as to admit of its being worked continuously with the Great Western line. No agreement was finally concluded between the Companies; but, pending negotiations, some of the directors of the new Company entered into an agreement with the London and North Western Railway Company (which received the sanction of the majority of the shareholders, and was executed under the corporate seals of both Companies), a term in which was as follows:—"The whole concern, without incumbrance, when completed, to be worked by the London and North Western and Midland Counties Railway Companies, who shall have perfect control and exercise all the rights of the Oxford Railway Company;" and another term was, that the Oxford Railway was to be completed as a narrow gauge double line between certain places therein specified. Some of the shareholders of the Oxford Railway Company being dissatisfied with the agreement entered into with the London and North Western Railway Company, filed a bill to restrain that Company, by injunction, from acting under that agreement, or using the funds of the Company in applying to Parliament to sanction it:—*Held*, that the Oxford Railway Company be enjoined from carrying into effect so much of the agreement as bound them to lay down any part of the line on the narrow gauge.

Held, that the Court will interfere by injunction to restrain Companies from applying any portion of their funds in a way not authorised by their Acts. That, although the Oxford Railway was to be made so as to be traversed continuously by the Great Western Railway Company, the Oxford Railway Company were not thereby prevented from making a line of a mixed gauge or narrow gauge beside it independently; but that they could not do so under the terms of an illegal agreement.

That an agreement by one Company to delegate its powers to another Company is illegal.

That one dissentient shareholder may file a bill to restrain an illegal proceeding by the Company, although such proceeding may have been sanctioned by a large majority of the shareholders.

Semle, that a Court of equity will not interfere by injunction to restrain the execution of an agreement involving a question of law, unless it appear that irreparable injury would result from non-interference.

THE bill in this case was filed by R. Beman, Major H. Court, and F. P. Barlow, the registered proprietors of a large number of shares in the Oxford, Worcester, and Wolverhampton Railway Company, on behalf of themselves and all other the shareholders in that Company, except the defendants thereto, against F. Rufford and eight other persons, directors of the said Company, and against The London and North Western, The Midland, The Oxford, Worcester, and Wolverhampton, and The Great Western Railway Companies. It stated, that, in 1844, the only railway communication between the South Staffordshire district and London, was by the Grand Junction Railway, and The London and Birmingham Railway (since amalgamated under the name of The London and North Western

(a) The facts of this case being applicable to other points since decided, and to be hereafter reported, are stated at greater

length than they otherwise would be, with the view of future reference.

Railway Company) which was quite insufficient, and left a large and important portion of that district without railway accommodation; and, consequently, that several gentlemen formed a scheme for making an independent Railway from Wolverhampton to London.

That, having regard to the fact of the Great Western Railway being formed from Oxford to London on the broad gauge, which was better suited for the heavy goods traffic of the district, the promoters considered it would be for the benefit of the Company, that the proposed line should be from Wolverhampton by Worcester to Oxford, there to unite with the Great Western Railway; and that the last-mentioned Railways should be worked in concert together.

That the promoters of the proposed line applied to the Great Western Railway Company, to concur with them in carrying out their scheme, which that Company agreed to do. And after some negotiation, a provisional agreement, dated the 15th of August, 1844, was entered into between the directors of the Great Western Railway Company of the one part, and the committee of management of the Oxford, Worcester, and Wolverhampton Railway Company of the other part; whereby the directors of the Great Western Railway Company agreed to guarantee to the proposed Company an annual payment of 35,000*l.*, as permanent rent for a lease of their line, and to pay over to them a moiety of the annual profits, after deducting the rent and all the expense of making the line; and the Great Western Railway Company also agreed to exert their influence to obtain an Act in the then next session of Parliament, at the expense of the projected Company. But, as conditions precedent to their obtaining the sanction of their proprietors, the Great Western Railway Company required proof, first, of a traffic of 75,000*l.*; secondly, that two-thirds of the landowners on the length of the line were consenting or neutral; thirdly, of the approbation of the Board of Trade; fourthly, of a bonâ fide subscription list to the extent of 600,000*l.*

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That the provisional committee of the projected Company agreed to these conditions, and undertook either to provide satisfactory proof thereof, or, in case of failure, to absolve the directors of the Great Western Railway Company from all engagements of guarantee or other assistance. And the Great Western Railway directors agreed to convene a special meeting of their proprietors at the earliest period after due proof of the four specified requirements, and to recommend that the sanction of the Company should be given at such special meeting by a formal agreement under their corporate seal.

That some alterations were afterwards made in the course of the line of the intended Railway, involving an increase of expenditure; and new terms were consequently agreed upon, and were embodied in another agreement, dated the 20th of September, 1844, made between the Great Western Railway Company of the one part, and the defendant F. Rufford and two other of the members of the committee of management of the intended Company of the other part; by which it was agreed that the capital of the projected Company should be 1,500,000*l.* That the directors of the Great Western Railway Company should guarantee to the projected Company an annual payment of 52,500*l.* as a permanent rent for a 999 years' lease of their projected Railway, with a double line of broad gauge rails complete, with stations and every requisite convenience for traffic, commencing from or near to the city of Oxford, and terminating at Wolverhampton with a junction with the Grand Junction Railway. And, after providing for the direction of the Railway, and for making certain branches, it was agreed, that, in addition to the fixed rent, the Great Western Railway Company should pay over a moiety of the annual profits to the projected Company. And it was agreed, that, if it should be found impracticable to complete the Railway within the amount of 1,500,000*l.*, and any further sum should be required, and any clear profit should be realised, the same should be first liable for the

payment of the interest on such surplus expenditure not exceeding 250,000*l.*, and a moiety of the balance only of such profits should be paid over to the projected Company; and provision was made for a reduction of the rent to be paid by the Great Western Railway Company in the event of the expenditure not reaching the supposed amount.

That, as soon as this further arrangement had been made, a prospectus of the proposed scheme was circulated, which, after setting forth the advantages of it, stated it at length, as hereinbefore set forth.

That afterwards the subscribers' agreement of the projected Company, dated the 1st of October, 1844, was prepared and executed by the shareholders, preparatory to the then intended application to Parliament; and it was thereby provided, that the provisional committee of the projected Company should be at liberty and should have full power (amongst other things) to enter into and make with the Great Western Railway Company such further agreements and arrangements, in Parliament and otherwise, for carrying into effect the two several agreements already entered into (which were, by the said agreement, approved of, ratified, and confirmed by the subscribers,) for the purpose of leasing to the Great Western Railway Company the Railway and undertaking thereby contemplated, upon such terms as might be deemed advisable by the managing committee, and might be arranged and agreed between them and the Great Western Railway Company, and in pursuance thereof to make an application to Parliament.

That, in 1845, the promoters of the Oxford, Worcester, and Wolverhampton Railway Company introduced into Parliament a bill for incorporating the projected Company; but that, in the same session, in order to defeat that bill, the London and Birmingham Railway Company introduced another bill into Parliament, to sanction a scheme for a ri-

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val line of Railway, to be called The London, Worcester, and South Staffordshire Railway, which was to run into the London and North Western line at Tring.

That the negotiations between the Oxford, Worcester, and Wolverhampton, and the Great Western Railway Companies were communicated by the directors of the latter Company to their shareholders, at the general half-yearly meeting, held in February, 1845, when the following resolution was agreed to:—"That the directors be and they are hereby empowered to take all necessary steps for applying to Parliament, either in their own names, or separately, or jointly with any corporations or persons, for bills for making Railways (among others) from Oxford to Worcester and Wolverhampton, with branches; and to agree with any person or persons who shall apply to Parliament for such bills for the construction of, or for taking on lease or using such Railways, or any part thereof, when made, either by guarantee or otherwise, and upon any such terms and conditions as may be agreed upon for such purpose."

That, after a severe struggle, the promoters of the Oxford, Worcester, and Wolverhampton Railway Company established their case to the satisfaction of both Houses of Parliament, and the bill incorporating the Company was passed into an Act, and received the royal assent on the 4th of August, 1845.

That, after enacting that the Companies, Lands, and Railways Clauses Consolidation Acts of 1845 should form part of that Act, it was, by the 3rd section, enacted, that the subscribers should be united into a Company, for the purpose of making and maintaining a Railway from the Great Western Railway at the city of Oxford to the city of Worcester, to join the Grand Junction Railway at Wolverhampton in the county of Stafford, with several branch Railways. And by the 4th section it was enacted, that the capital of the Company should be 1,500,000*l.* And by the 11th section, after reciting that the formation of the Railways

thereby authorised would be beneficial to the interests of the Great Western Railway Company, it was enacted that it should be lawful for that Company to subscribe towards and become shareholders in the undertaking thereby authorised to an extent not exceeding 750,000*l.*, which might be agreed or resolved upon by them at any general meeting specially convened for that purpose. And by the 12th section it was enacted, that, for such purpose, it should be lawful for the Great Western Railway Company to raise the sum which might be agreed or resolved to be advanced by them by the creation of new shares, of such amount and upon such terms and conditions as might be determined by a majority of the shareholders present at any general meeting of the Great Western Railway Company; or it should be lawful for the Great Western Railway Company, if they thought fit, to guarantee interest out of their corporate funds or annual revenue, after a rate not exceeding 5*l.* per cent. per annum on the shares for which, by the said Act, they were authorised to subscribe. That, by the 13th section, it was enacted, that, at all general and special general meetings of the Company thereby incorporated, the said Great Western Railway Company, in case they should subscribe any portion of the capital, might vote in respect of the shares held by them; but that it should not be lawful for any of the directors of the Great Western Railway Company, or any person on their behalf, to vote on any question relating to the sale or lease of the Railway or any part thereof to the Great Western Railway Company, or to the working or using thereof by such Company: And it was further provided, that the Great Western Railway Company should nominate a certain number of the directors of the Oxford, Worcester, and Wolverhampton Railway Company. That, by the 32nd section, it was enacted, that the proposed Railway should commence by a junction with the Oxford branch of the Great Western Railway at Oxford, and should terminate at or near the Wolverhampton station of the Grand Junction Railway. That it was, by the 38th

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section, enacted, that the said Railway, branch railway, and works should be constructed and completed in all respects to the satisfaction of the engineer for the time being of the Great Western Railway Company; and that the said Railway should be formed of such gauge and according to such mode of construction as would admit of the same being worked continuously with the Great Western Railway. That it was also enacted, that the said Company thereby incorporated should, and they were thereby required to lay down and maintain, upon the whole extent of the Railway thereby authorised, between the point of junction thereof with the Birmingham and Gloucester Railway at Abbotswood and the point of junction thereof with the Grand Junction Railway near Wolverhampton, such additional rails, adapted to the gauge of the Birmingham and Gloucester and Grand Junction Railways as might be requisite for allowing the free and uninterrupted passage between the said Railways; such additional rails to be laid down and maintained and used to the satisfaction and to be subject to the approval of the Board of Trade. That the Great Western Railway Company and the then incorporated Company should, if required by the Commissioners for the improvement of the river Severn, pay yearly such a sum as, together with the tolls received by the Commissioners, would make up 140,000*l.*; such payments to be binding upon each of such Companies severally and respectively. That by the 128th section it was enacted, that it should be lawful for the Company to let on lease the Railways and works thereby authorised to the Great Western Railway Company, for such term of years and on such conditions as might be mutually agreed upon; and that it should be lawful for the Great Western Railway Company, with the approbation of three-fifths of the shareholders in general meeting especially convened for the purpose, to accept and take such lease; and by the 129th section, that it should be lawful for the Company, with the authority of three-fifths of the votes of the proprietors at some general meeting specially convened

for the purpose, to sell and transfer to the Great Western Railway Company, and with the like authority on the part of the Great Western Railway Company to purchase, the said Railways, but subject to any existing mortgages, contracts, agreements, or liabilities affecting the same; with power to the Great Western Railway Company to create such additional number of shares in the undertaking of the Great Western Railway, or to borrow on mortgage such money as might be necessary for completing the said purchase; and that, after such purchase, the Railways thereby authorised to be made should be amalgamated with and form part of the undertaking of the Great Western Railway Company. That it should be lawful for the then incorporate Company, and for the Great Western Railway Company, to enter into such contracts and agreements for effecting the purposes of the Act, or for otherwise working or using the said Railways as they the said Companies might deem advisable; and that any contract made before the passing of that Act, by the provisional committee of the Company thereby incorporated, and the directors of the Great Western Railway Company, with the sanction of any general meeting of the last-mentioned Company, should be as valid and binding in every respect as if made subsequently to the passing of the Act. That if the Company thereby incorporated should fail to complete the Railway and branches, it should be lawful for the Great Western Railway Company, after giving one month's notice of their intention so to do, to enter upon and proceed with the construction thereof. That it had been considered just and reasonable to require that the Great Western Railway Company, who might become not only lessees or purchasers of the Railway, but would derive great advantage therefrom, should be subjected to the provisions of the 7 & 8 Vict. c. 85 (a).

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(a) Intituled "An Act to attach certain conditions to the construction of future Railways authorised or to be authorised

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That in exercising the power given by the Act, the Great Western Railway Company took shares in the Oxford, Worcester, and Wolverhampton Railway Company, and had from time to time appointed members of their own body to be directors of that Company; and that the directors of the Oxford Company had appointed a committee, consisting of F. Rufford, the chairman, and others, to enter into all necessary arrangements with the Great Western Railway Company for a lease of the Oxford, Worcester, and Wolverhampton line to the Great Western Railway Company. That it being soon evident, that the capital would not be sufficient for the construction of the Railway with certain additions, a correspondence passed between the two Companies for the enlargement of the guarantee by the Great Western Railway Company; and in consequence thereof, estimates were made and submitted to the Great Western Railway Company. And at a board meeting, on the 10th of February, 1846, the directors of that Company passed resolutions authorising the directors to enter into an agreement with the Oxford, Worcester, and Wolverhampton Railway Company, for modifying the terms and conditions of the lease, by extending the guarantee to such sum as might be necessary; and that if such sanction and authority should be obtained from the general meeting, it would be expedient to increase the amount on which such guarantee should be given, from 250,000*l.* to 750,000*l.*; and that the new shares to be raised by the Oxford, Worcester, and Wolverhampton Railway Company, should be offered rateably in the distribution to the shareholders of the Great Western Railway Company, *pari passu* with those of the Oxford, Worcester, and Wolverhampton Railway Company. That no works should be undertaken, nor any capital expended, for purposes other than those included in the estimates, without the previous sanction of the Great Western Railway Company.

by any Act of the present or succeeding Sessions of Parliament, and for other purposes in relation to Railways."

That the Great Western Railway Company and the committee of management of the Oxford, Worcester, and Wolverhampton Railway Company had an interview on the subject of the resolutions, whereat the former Company expressed their concurrence therein; and on the 2nd of February, 1846, a resolution was passed at a general meeting of the Great Western Railway Company, that the directors be empowered to enter into an arrangement with the directors of the Oxford, Worcester, and Wolverhampton Railway Company for modifying the terms and conditions previously arranged for the lease of their line.

That these resolutions were made known to the Oxford, Worcester, and Wolverhampton Railway Company, and were entered upon their minutes, and embodied in the report of the directors; and at a meeting of the shareholders of that Company, on the 27th of the same month of February, a resolution was passed, that the directors of the Company be and they were thereby empowered to enter into an agreement with the directors of the Great Western Railway Company for modifying the terms and conditions previously arranged for the lease of that line to the Company, subject to such conditions as might seem equitable between the two Companies.

The bill alleged, that it was for the interests of the shareholders in the Oxford, Worcester, and Wolverhampton Railway Company, that the line of their Railway should be worked in concert with the Great Western Railway Company.

That the Oxford, Worcester, and Wolverhampton Railway Company proceeded to construct their line, with the view of working it when completed in connection with the Great Western Railway Company upon the broad gauge, according to the provisions of the Act of Parliament, and in pursuance of the agreement entered into with the Great Western Railway Company; but that difficulties having arisen in raising the necessary capital, the further progress thereof had been partially suspended. That arrange-

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ments had then recently been made for immediately resuming and completing the works.

The bill then stated, that very lately a majority of the directors of the Oxford, Worcester, and Wolverhampton Railway Company had determined not to carry into effect the aforesaid modified agreement, nor to enter into any other agreement, nor to work the line in connection with the Great Western Railway; but had lately, under the influence and control of the London and North Western Railway Company and the Midland Railway Company, entered into an agreement with those Companies in the following terms: "The Oxford, Worcester, and Wolverhampton Railway to be completed as a narrow gauge double line (except as follows) ready for efficient working in all respects from the Bucks line at Oxford. The whole concern, without incumbrance, when completed, to be worked by the London and North Western and Midland Counties Railway Companies, who shall have perfect control and exercise all the rights of the Oxford, Worcester, and Wolverhampton Railway Company, and who shall find stock, and work the concern for twenty-one years, on the following terms:—The gross receipts from all sources to be carried to the common fund, out of which the following charges to be made in the order stated—

"First, 53,000*l.* per annum to the Oxford, Worcester, and Wolverhampton Railway Company, to provide for debentures and preference shares, or such less or greater sum not exceeding 60,000*l.* as might from year to year be sufficient within such limit to provide for such charges.

"Secondly, 53,000*l.* to be taken by the London and North Western and Midland Counties Railway Companies for working expenses, wear and tear, &c.

"Thirdly, the balance of gross receipts (the excess, if any, above 106,000*l.*) to be divided in the proportions of two-thirds to the Oxford, Worcester, and Wolverhampton Railway Company, and one-third to the London and North

Western and Midland Counties Railway Companies, until the gross receipts reach 150,000*l.* per annum; from which joint all excess receipts above 150,000*l.* to be equally divided between the Oxford, Worcester, and Wolverhampton Railway Company and the London and North Western and Midland Counties Railway Companies. There is divided under this

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	<i>To Oxford, Worcester, and Wolverhampton Railway Company.</i>	<i>To London and North Western and Midland Counties Railway Co.</i>
When earnings are £106,000 .	£53,000 .	£53,000
„ „ 151,000 .	83,000 .	68,000
„ „ 201,000 .	108,000 .	93,000

Should more than 53,000*l.* be required to pay interest and debentures, the excess, within the limit of 60,000*l.*, also to be paid to the Oxford, Worcester, and Wolverhampton Railway Company. Equal mileage rates to be allowed to the Oxford, Worcester, and Wolverhampton Railway Company and the London and North Western and Midland Counties Railway Companies. The route for the traffic where the lines of the three parties to this agreement go to and from the same places to be settled by Messrs. Peto and Glyn (or Mr. Beale) with an umpire in case of need, it being expressly understood, that, while the Oxford, Worcester, and Wolverhampton Railway Company is credited with its fair and full amount of traffic, the interests of the London and North Western and Midland Counties Railway Companies, who take the responsibility of this agreement, shall also be equally considered in the matter, it being understood that every thing is to be done with a view to the treating the lines of the Oxford, Worcester, and Wolverhampton Railway Company and London and North Western and Midland Counties Railway Companies as one interest, so far as respects the competition of other Companies. A single line only (with proper sidings and passing places and the telegraph) to be laid down in the first instance between Oxford and Moreton in the Marsh (or Daylesford); but the

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line to be doubled at the cost of the Oxford, Worcester, and Wolverhampton Railway Company, provided, during the existence of this agreement, the traffic requires it. A junction to be made by the Oxford, Worcester, and Wolverhampton Railway Company with the Stour Valley line at Tipton. All liabilities, including the Severn Navigation liability, to be provided for (under the meaning of clause 2) by the Oxford, Worcester, and Wolverhampton Railway Company. The canals and Moreton tramway to be treated as part of the Railway, and as included in this arrangement. Any question as to the sufficiency or extension of the accommodation of the line, works, stations, &c., as well as all other questions arising under the agreement, and during the continuance of the same, to be settled by the arbitration of Mr. Smith and Mr. Peto, with an umpire chosen by them if needed." And to this agreement was appended a memorandum to the following effect:—"It is understood, that if any portion of the line be ready for working, with proper stations, &c., before the remainder, Mr. Glyn shall fix the terms, as between the Company on whose line the same abuts, and the Oxford, Worcester, and Wolverhampton Railway Company, on which the same is to be worked, until the whole be completed."

At a board meeting of the directors of the Oxford, Worcester, and Wolverhampton Railway Company, held on the 21st of February, 1851, a resolution was passed, that the seal of the Company be affixed to the foregoing agreement; and that the document, when sealed, should be delivered as an escrow to the solicitors, with instructions to exchange the same for a similar document executed by the London and North Western Railway Company. And certain other resolutions were then passed to the following effect:—

That the line to be made by the Company should not comprise more than the main line from Wolverhampton to the Stour Valley line at Tipton, with a branch to join the Midland Railway at Stoke Works.

That nothing in the agreement should compel the Com-

pany to traverse the Act of Parliament in respect of the gauge of the Railway.

The bill alleged, that Mr. Glyn was chairman of the London and North Western Railway Company, and Mr. Peto of the Chester and Holyhead Railway Company; and that Mr. Beale was a director of the Midland Counties Railway Company. That, by the report of the directors, at the half-yearly meeting of the Oxford, Worcester, and Wolverhampton Railway Company, on the 28th of February, 1852, it was stated, that the foregoing arrangement had been concluded; and, under the influence and control of the London and North Western and Midland Counties Railway Companies, that the report was received and adopted by the majority of the votes at such meeting; and that the agreement had been executed by the several Companies, under their respective corporate seals; and that they were about to carry the same into effect. That such agreement was contrary to the interests of the shareholders in the Oxford, Worcester, and Wolverhampton Railway Company, and contrary to the constitution of the Company, and the express enactments by which the Company had been constituted; and that there was not in any Act relating to any of the said Companies any power to enter into such agreement; and that such agreement was beyond the powers of the Companies, and inconsistent therewith; but that the directors insisted on the validity of the said agreement, and intended to carry the same into effect.

That Abbotswood was the place at which the Oxford, Worcester, and Wolverhampton Railway was to cross the Birmingham and Gloucester Railway; and that, pursuant to the Acts of Parliament of 1845, the Oxford, Worcester, and Wolverhampton Railway was, throughout its whole length, to be constructed of the same gauge as the Great Western Railway, commonly called the broad gauge, so as to admit of its being worked continuously with that Railway; and that there were no provisions for laying rails on the narrow gauge on the whole of the Oxford, Worcester,

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and Wolverhampton Railway, or, in fact, on any part of such line to the south of Abbotswood; and yet it was the intention of the Company at once to construct them on the narrow gauge, in order to carry out the provisions of the agreement.

That the funds of the Company were not sufficient to make lines of rail on the broad and on the narrow gauge also, even if they were empowered by Act of Parliament to do so; and that they had, in fact, abandoned all intention to make the line so as to be worked continuously with the Great Western Railway, and were about to make it to run continuously with the London and North Western and the Midland Counties Railways, in violation of the Acts of Parliament.

That the board of directors had abandoned or intended to abandon the construction of several branch Railways authorised by their Acts, on the ground of want of sufficient funds to enable them to construct the same.

That, by the agreement with the London and North Western Railway Company, the Oxford, Worcester, and Wolverhampton Railway Company were attempting to delegate their powers to the former Company; and that it was part of the said agreement, that certain revenues or monies of the Oxford, Worcester, and Wolverhampton Railway Company, and generally the whole receipts to be derived from that undertaking, should be dealt with and disposed of by the London and North Western and Midland Counties Railway Companies; and that the three Companies intended to employ the same in making or supporting an application to Parliament to give effect to the said agreement.

The bill charged, that it was not then, and never could be, the interest or intention of the London and North Western and Midland Counties Railway Companies fairly and efficiently to work the Oxford, Worcester, and Wolverhampton Railway, or fully to develop the traffic thereof; inasmuch as the Oxford, Worcester, and Wolverhampton

Railway was a line competing with those of the former Companies; and it was the interest and would be the aim and object of those Companies to divert from the Oxford, Worcester, and Wolverhampton Railway to their own proper lines all traffic beyond such an amount as would produce the annual sum of 106,000*l*. That, in pursuance of the power in the first-mentioned Act of Parliament, the Commissioners of the Board of Trade had lately required the Great Western Railway Company to complete the Oxford, Worcester, and Wolverhampton Railway; and an information had been since then filed against the Great Western Railway Company in the Court of Queen's Bench, to compel that Company to complete the same; which information was then pending. That, by virtue of the Acts of Parliament and agreement, the Great Western Railway Company claimed to be entitled to have a lease of the Oxford, Worcester, and Wolverhampton Railway. That, in fact, irrespectively of the agreements of the 15th of August and 20th of September, 1844, the Great Western Railway Company were bound to fulfil the obligations under which they had, by the Acts of Parliament and otherwise, come with respect to the shareholders of the Oxford, Worcester, and Wolverhampton Railway Company, and the district of South Staffordshire; and in particular to give to such shareholders and district the free and continuous use of their line from Oxford. And that, if the agreement with the London and North Western and Midland Counties Railway Companies was permitted to be carried into effect, the shareholders of the Oxford, Worcester, and Wolverhampton Railway Company would be deprived of the benefit of the free and continuous use of the Great Western Railway, and the other portions of the Acts of Parliament.

The bill prayed a declaration that the last-mentioned agreement with the London and North Western and Midland Counties Railway Companies was at variance with the provisions of the Act of Parliament. And it prayed that the defendants (the directors), and all others the offi-

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cers, servants, and agents of the Oxford, Worcester, and Wolverhampton Railway Company, and the defendants the London and North Western and Midland Counties Railway Companies, and, if necessary, the Oxford, Worcester, and Wolverhampton Railway Company, might be restrained, by the interim as well as perpetual injunction of the Court, from carrying into effect the said agreement, and from doing any act towards carrying out or ratifying such agreement, and from constructing the works of the Oxford, Worcester, and Wolverhampton Railway, or any part thereof, pursuant to the said agreement, or otherwise than in conformity with the Act of Parliament passed in 1845; and from expending the funds of the Company or pledging the credit of the Company about the construction of the Railway or any works thereof in conformity with such agreement; and from using the name or monies of the Company for the purpose of making any application to Parliament to give effect to the agreement.

The plaintiffs now moved for an injunction, in the terms of the prayer of the bill.

The plaintiffs filed affidavits in support of the motion, verifying the facts stated in the bill.

Affidavits in opposition to the motion were filed by three of the directors of the Oxford, Worcester, and Wolverhampton Railway Company, stating that they had been advised and believed, that the alleged agreement of the 20th of September, 1844, was not valid or binding on the Oxford, Worcester, and Wolverhampton Railway Company, nor on the Great Western Railway Company; and that such alleged agreement, as modified by the said resolution of the Great Western Railway Company of the 10th of February, 1846, was not valid or binding; and that there was no valid or binding agreement between the Oxford, Worcester, and Wolverhampton Railway Company and the Great Western Railway Company.

That the Oxford, Worcester, and Wolverhampton Rail-

way Company, being unable to conclude any satisfactory and legal agreement with the Great Western Railway Company; and being in considerable pecuniary difficulty, mainly occasioned by the refusal of the Great Western Railway Company to conclude any valid agreement with the Oxford, Worcester, and Wolverhampton Railway Company, the directors of the last-mentioned Company determined, in the month of January then last, to apply to some other Company to enter into traffic arrangements on fair terms, and with a view to the benefit of the proprietors of the Oxford, Worcester, and Wolverhampton Railway Company.

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That the directors of the Oxford, Worcester, and Wolverhampton Railway Company were not, as alleged in the bill, then acting under the influence of the London and North Western and Midland Counties Railway Companies; but that, believing that such arrangement was then necessary for the completion of the Oxford, Worcester, and Wolverhampton Railway, and for the welfare of the Company, they concluded an agreement with the London and North Western and Midland Counties Railway Companies.

That the report, made on the 28th of February, 1851, by the directors of the Oxford, Worcester, and Wolverhampton Railway Company to the meeting of the shareholders in that Company, held on that day, was adopted by an overwhelming majority, and almost unanimously.

That the expense of laying down, on the Oxford, Worcester, and Wolverhampton Railway, a single line of railway on the mixed or double gauge between Abbotswood and Wolvercott, near Oxford, and also a single line of railway on the narrow gauge from Abbotswood to Moreton-in-the-Marsh, or to Daylesford, as the case might be, would not exceed the expense of laying down a double line of rails on the broad gauge from Abbotswood to Wolvercott aforesaid.

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That the funds of the Oxford, Worcester, and Wolverhampton Railway Company, if sufficient to construct a double line of rails on the broad gauge between Abbotswood and Wolvercote, as they believed them to be, would be sufficient to construct a single line on the mixed or double gauge between Abbotswood and Wolvercote, and also a single line of railway on the narrow gauge from Abbotswood to Moreton-in-the-Marsh or Daylesford, as the case might be.

That, previously to the agreement of the Oxford, Worcester, and Wolverhampton Railway Company with the London and North Western and Midland Counties Railway Companies being entered into, an estimate, which they believed to be correct, had been made of the expense of constructing the whole of the main line of the Oxford, Worcester, and Wolverhampton Railway with a double line of rails on the broad gauge throughout; and that the funds of the Company were then stated by very competent persons to be, as they believed them in fact to be, more than sufficient to pay the amount of such estimate.

That a saving on the whole of the estimate would be effected if the Railway was constructed on a single line of railway, on the mixed or double gauge between Abbotswood and Wolvercote, and also with a second line of rails on the narrow gauge between Abbotswood and Moreton-in-the-Marsh, or Daylesford, as the case might be.

That they were informed, and believed, that it was lawful and consistent with the provision of the Oxford, Worcester, and Wolverhampton Railway Act, 1844, that the broad gauge should be laid down only on one line of rails; and that it was intended by the directors that a single line of rails on the broad gauge should be laid down throughout the whole length of the Railway; and that there was not any provision whatever in the Act, under which the Oxford, Worcester, and Wolverhampton Railway Company was established, which prohibited or

prevented the laying rails on the narrow gauge on the whole of the Oxford, Worcester and Wolverhampton Railway.

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That, believing it to be within the powers of the Oxford, Worcester, and Wolverhampton Railway Company to lay down rails on the narrow as well as the broad gauge, and that the exercise of such power was within the financial means of the Company, and that the agreement with the London and North Western Railway Company and the Midland Railway Company would be thereby rendered more beneficial to the Oxford, Worcester, and Wolverhampton Railway Company, the directors of that Company proposed to lay rails on the whole of the lines of the Oxford, Worcester, and Wolverhampton Railway, as well on the narrow as on the broad gauge, and to form the whole of the Railway with reference thereto.

They denied that the directors were expending, or that, except with the sanction of Parliament, they intended thereafter to expend the monies and funds of the Company in constructing the Railway with rails throughout the whole length on the narrow gauge only. That the contracts entered into for the works on the Railway had been entered into before the making of the agreement, and were with the view of laying down rails on the broad gauge; and that no change in the terms of such contracts had been made or were intended to be made, except so far as to enable the Oxford, Worcester, and Wolverhampton Railway Company to order the laying down of rails on the narrow as well as the broad gauge.

That they believed that the directors of the Oxford, Worcester, and Wolverhampton Railway Company had authorised contracts to carry on and complete their Railway throughout the whole length, so as to be adapted to work continuously with the Great Western Railway, and to have rails on the narrow gauge from Abbotswood to Wolvercote in addition; and that the funds of the Com-

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pany were more than sufficient to accomplish both objects. That the directors of the Oxford, Worcester, and Wolverhampton Railway Company were proceeding to construct their Railway in conformity with their Act, and the agreement with the London and North Western and Midland Counties Railway Companies, which was not in violation of their Acts; and they denied that they had delegated their powers to or permitted their monies or revenues to be received by any other Company. That they believed the agreement entered into with the London and North Western and Midland Counties Railway Companies was binding of itself, without the sanction of Parliament; and that they did not intend to use or employ the funds or monies of the Oxford, Worcester, and Wolverhampton Railway Company in making or supporting any application to Parliament to give effect to the agreement with the London and North Western and Midland Counties Railway Companies.

The affidavits in reply stated, that, some time previously to the date of the agreement with the London and North Western and Midland Counties Railway Companies, the directors of the Oxford, Worcester, and Wolverhampton Railway Company had made arrangements for obtaining the whole of the additional capital necessary to complete the Railway, and had issued preference shares to a large amount, of fifty of which the deponent was a holder, and which bore a premium in the market before the agreement was entered into.

That the Railway mentioned in the agreement would have been, and could still be, completed without any aid or assistance from the London and North Western or the Midland Counties Railway Companies; and that the Great Western Railway Company were ready and willing to come to a fair and equitable arrangement with the Oxford, Worcester, and Wolverhampton Railway Company; but that no proposal upon the same or similar terms as

those contained in the agreement with the London and North Western and Midland Counties Railway Companies had ever been made to the Great Western Railway Company; and that such terms, if made with the Great Western Railway Company, would be more beneficial to the shareholders than the proposed agreement with the London and North Western and Midland Counties Railway Companies. It was also stated on one side, but denied on the other, that the agreement with the Great Western Railway Company had been put an end to, by that Company wishing to limit their guarantee, which it was contended by the Oxford, Worcester, and Wolverhampton Railway Company was, in the first instance, for the whole expenses of constructing the line.

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Mr. *R. Palmer* and Mr. *G. L. Russell* appeared in support of the motion for an injunction, and contended, that by the original agreement and the Act of Parliament the Oxford, Worcester, and Wolverhampton Railway Company were bound to enter into some agreement for the lease of their line, and the working of their Railway continuously with the Great Western Railway; and it was not competent for them to set aside that inchoate agreement, on the ground that the terms had not been definitively settled. That there was every disposition on the part of the Great Western Railway Company to conclude finally the terms of the agreement, or even to accept the same terms as those offered to the London and North Western Railway Company. That the object of the Act was the benefit which would arise to the public from the competition between the Great Western and the London and North Western Railway Companies; and that that object would be entirely defeated, if the proposed agreement were allowed to remain in force. That the agreement itself was in violation of the letter and spirit of the Act of Parliament, and would probably have the

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effect of preventing the completion of a Railway, which it was the obvious interest of the London and North Western Railway Company should remain unmade. That the agreement with the London and North Western Railway Company was clearly beyond the powers of that Company, and although executed under their common seal could not be binding against a dissentient shareholder.

Mr. *Bethell* and Mr. *Freeling*, for the Great Western Railway Company (who were also in favour of the motion), divided their arguments into three heads: first, the effect of the subsisting agreement with the Great Western Railway Company; secondly, the effect of the proposed agreement with the London and North Western Railway Company on the provisions of the Act, and the character and destination thereby given to the Oxford, Worcester, and Wolverhampton Railway Company; and thirdly, the right of all parties interested in that Company to restrain the proposed agreement with the London and North Western Railway Company from being carried out. They contended, that the agreement with the Great Western Railway Company was a valid inchoate agreement; but that, whether it was now binding or not, the directors could not, in manifest contravention of the rights granted to the Great Western Company by Act of Parliament, now pledge the Oxford, Worcester, and Wolverhampton Railway Company to the London and North Western Railway Company. The cases on the subject, beginning with decisions of Lord *Eldon*, went to shew, that, where a Company was incorporated for a particular object, it was not in the power of the whole Company or the managing body to give it a different destination, and such an attempt would be restrained: *Bagshawe v. The Eastern Union Railway Company* (a), *Ward v. The Society of Attorneys* (b), *Collinson v. The Eastern Counties Railway*

(a) *Ante*, Vol. 6, p. 152.

(b) 1 Coll. 370.

Company (a), Carlisle v. The South Eastern Railway Company (b). The object of the defendants was to join the Oxford line with the Bucks Railway by way of Banbury; but that would be a virtual repeal of their Act. Neither the Oxford, Worcester, and Wolverhampton Railway Company nor the Great Western Railway Company could agree with any other Company until released from their present engagements by a competent tribunal. It was said, that the Great Western Railway Company repudiated the agreement; this Court could not decide that question, for it was one between the Great Western Railway Company and the Oxford, Worcester, and Wolverhampton Railway Company, and not an issue which the Court could declare to be a ground for refusing the injunction. The instant it was shewn that the defendants either meant to stop Parliamentary enactments on the one hand, or to proceed beyond them on the other, the Court would interfere by injunction. The agreement with the North Western Railway Company could not be recognised, because it was a violation of the Act of Parliament, and illegal and impossible in itself. It was inconsistent with the declaration that the Railway was to be used continuously with the Great Western; and it was inconsistent with the provision by which the engineer of the Great Western Railway Company was to superintend the making of it. The agreement sought to be carried into effect with the London and North Western Railway Company was in fact most improvident; and although it might be true, that the directors of the Oxford, Worcester, and Wolverhampton Railway Company were bound to attach their Company to one of the great Companies, yet, from the present arrangement, it was clear that not a shilling would ultimately remain to the original shareholders, to whom therefore it could not but be productive of great loss and disadvantage. The real motive of the present proceedings of the London and North Western Railway Company was

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(a) Ante, Vol. 4, p. 513.

(b) Ante, Vol. 6, p. 670.

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apparent, when it was proved, as it had been, on investigation that the carrying out of the agreement would be in fact a loss to them; and therefore it was for disarming their rivals, the Great Western Railway Company, only that they were prosecuting it. The resolutions which had passed, moreover, shewed that some of the shareholders, for the purpose of getting rid of their own burdens, wished to carry out the proposed arrangement with the London and North Western Railway Company, although at the sacrifice of the Oxford, Worcester, and Wolverhampton Railway Company. That it was sought to be shewn that the agreement with the London and North Western Railway Company was merely a traffic arrangement, but, in fact, it was for a lease. That the agreement was for a narrow gauge double line; but when the directors of the Oxford, Worcester, and Wolverhampton Railway Company were pressed on the subject, they stated that it was understood that it should be partly a broad gauge, and they sought, in fact, to modify a written agreement by parol; and, having got a resolution passed as to narrow gauge, they became aware of the illegality of it, and by abandoning a part they endeavoured to carry out the rest. That the Great Western Railway Company were entitled at least to this, that the Oxford line should be first of all laid down with the broad gauge, as authorised by their Act; it would then be necessary to get the consent of the shareholders to the formation of the narrow gauge line, even supposing the Act allowed it, which it did not. That the plaintiff, although in a minority, had a right to file a bill to prevent an illegal application of the funds of the Company.

Mr. *Malins* and Mr. *Jessell* for the first-named defendants, the chairman and directors of the Oxford, Worcester, and Wolverhampton Railway Company, contended, that the effect of the Act of Parliament was merely to give a parliamentary character to the terms of a contract, which both parties seemed then inclined to enter into. That no union

had in fact been created between these Railway Companies, but an opportunity had been given for creating one, if terms could be agreed upon between them. That the Great Western Railway Company had shewn an unwillingness to proceed further with any contract, which was to be accounted for by their having purchased the Birmingham and Oxford line; and that, if the present application was complied with, the effect would be, that the Oxford, Worcester, and Wolverhampton line would never be completed, and the interests of the shareholders would be sacrificed.

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Mr. *Rolt*, Mr. *Willcock*, and Mr. *Speed*, for other defendants in the same interest with the London and North Western Railway Company, contended, that there was no existing contract, and no union created by Act of Parliament. If there was a contract, why did not the plaintiffs seek to enforce it by bill for specific performance. That no terms had in fact been agreed upon, and no proposition for a lease of the Oxford, Worcester, and Wolverhampton line had yet been submitted to the shareholders of the Great Western Railway Company for their approval, without which the directors of that Company could not offer any terms, or propose any binding agreement. That it was quite clear, that the original agreement had been abandoned by both parties; and that the only chance for the Oxford, Worcester, and Wolverhampton Railway Company, was to unite itself with the London and North Western Railway Company, who were willing to provide the means of completing the Railway. That the agreement with the London and North Western Railway Company was not in itself illegal; and, having received the sanction of the shareholders, the Court would not interfere to prevent its completion: *Foss v. Harbottle* (a), *Mozley v. Alston* (b), *Lord v. The Copper Miners Company* (c).

The *Solicitor General*, Mr. *Follett*, and Mr. *Berkeley* appeared for other defendants.

(a) 2 Hare, 461.

(b) Ante, Vol. 4, p. 636.

(c) 2 Ph. 740.

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Mr. Roundell Palmer replied.

THE VICE-CHANCELLOR—The bill is filed by three of the shareholders in the Oxford, Worcester, and Wolverhampton Railway Company, on behalf of themselves and of all the others; and the object of it is to prevent the funds of the Company from being applied in a mode in which, by Act of Parliament, they are not authorised to be applied; and the parties who have filed this bill were clearly entitled to file it for that purpose. No doubt, the parties who are materially interested in this question are the Great Western Railway Company; there is no disguising that, nor, as far as I can see, is there any wish to disguise it. The bill, however, is filed by the shareholders in the Oxford, Worcester, and Wolverhampton Railway Company; and the principle on which they are entitled to file it on behalf of themselves and all the other shareholders is, that the Court will not allow any of them to say, that they are not interested in preventing the laws of their Company from being violated. It will not allow any of them to speculate as to whether it would be more advantageous or not to do something which the Act of Parliament does not authorise to be done; and therefore it is that a very small number, or indeed one of the shareholders, may file a bill on behalf of the whole body, although at a meeting of the Company a large majority of the other shareholders may have sanctioned that course of proceedings which the bill complains of.

The shareholders filing this bill say, that their Company, together with the directors of it, have entered into a contract with the London and North Western and the Midland Counties Railway Companies to make a Railway different from that which was contemplated by the Act of Parliament, and to apply funds, which the plaintiffs say are their funds, in a mode in which they were never authorised to be applied; and therefore the plaintiffs seek to restrain such application.

The case was rested mainly on three grounds:—First of all, it was said, that, by the Act of Parliament which incorporates the Oxford, Worcester, and Wolverhampton Railway Company, there was a sort of union constituted between them and the Great Western Railway Company, which rendered it impossible for the Oxford, Worcester, and Wolverhampton Railway Company afterwards to unite themselves in interest with the London and North Western Railway Company, or the Midland Counties Railway Company, to the prejudice of the Great Western Railway Company. Secondly, it was said, that if that be not a correct view of the case, still there were contracts between the Oxford, Worcester, and Wolverhampton, and the Great Western Railway Companies, which prevented them, independently of the Act of Parliament, or if not independently together with the Act of Parliament, from contracting with the London and North Western and the Midland Counties Railway Companies. And, thirdly, it was said, that the contract which had been entered into between the Oxford, Worcester, and Wolverhampton Railway Company, and the London and North Western and Midland Counties Railway Companies, was a contract which, irrespective of any engagement of the Oxford, Worcester, and Wolverhampton Railway Company with the Great Western Railway Company, was of itself illegal, and therefore ought not to be carried into effect.

If the last point be established, I am clearly of opinion, both on principle and authority, that it is the province of this Court to prevent such a contract from being carried into effect; for, it has often been laid down, that this Court will not permit parties having the enormous powers which Railway Companies obtain, to apply one farthing of their funds in a way which differs in the slightest degree from that in which the legislature has provided that they should be applied.

I have said it is my opinion, and it is my strong opinion, that the contract which has been entered into between

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the Oxford, Worcester, and Wolverhampton Railway Company, and the London and North Western and Midland Counties Railway Companies, is a contract which is illegal; at the same time it is undoubtedly purely a legal question; and, therefore, I must direct a case to be stated for the opinion of a Court of law upon that point.

Then the question arises, what is to be done after the case is stated, and before the opinion of the Court of law is given upon it? That I take to be purely a question for the discretion of this Court. The present Lord Chancellor, Lord *Truro*, states that very distinctly in the case to which I was referred—the *Shrewsbury & Birmingham Railway Company v. The London and North Western Railway Company*(a). That case came before Lord *Truro* on a motion to dissolve an injunction, which was granted by Lord *Cottenham* after he had decided, that the contract which had been entered into between the parties was a legal contract, or, at all events, that the bill which sought a specific performance of that contract was not demurrable; and Lord *Truro*, evidently I think doubting whether Lord *Cottenham* had not been hasty in his view, gave the plaintiffs liberty to bring such action as they might be advised; but refused, and I think most wisely, to continue the injunction until the trial of the action. His Lordship, however, directed the defendants to keep an account, which he said would probably be more beneficial to the plaintiffs than continuing the injunction would be; for, if it should turn out eventually that the defendants had no right to do what the bill sought to prevent them from doing, he should only have to direct them to account to the plaintiffs for the profits which they had made, and complete justice would be done to the plaintiffs; and if it should turn out otherwise, no injury would be done to any one. But that is not the case here, because the plaintiffs say that their money is intended to be laid out in constructing a Railway which the Company have no right to construct; and that thereby irreparable injury will

(a) 3 Mac. & G. 70.

be done to them, for their money cannot be got back by taking up the rails and selling them; and that the Company, if not insolvent, is in great pecuniary difficulties. Under these circumstances, if I am right in saying that the agreement is illegal, or that it has such an appearance of illegality that I must direct a case for the opinion of a Court of law, I must couple that with an interim injunction, restraining the expenditure of the money in the prohibited mode; and that is the course which I propose to take.

That being so, I will now state why I think that this agreement is illegal. It first stipulates, that the Oxford, Worcester, and Wolverhampton Railway, except a certain part of it, on which a single line of narrow gauge rails is to be laid down, shall be constructed as a double narrow gauge line; consequently, according to this agreement, rails are to be laid down throughout the whole of the line on the narrow gauge. Then the first question that arises is, whether, regard being had to their Act of Parliament, the Oxford, Worcester, and Wolverhampton Railway Company have a right to make a narrow gauge line throughout? In my opinion, although I intend to grant the interim injunction, they have; for I think that all that they are bound to do in conformity with their Act of Parliament is, to form their Railway of such a gauge as will admit of its being worked continuously with the Great Western Railway, and to lay down on certain parts of their line additional rails adapted to the gauge of the Birmingham and Gloucester and Grand Junction Railways; that is to say, to make a broad gauge throughout the whole line, and a mixed gauge or a narrow gauge on part of it.

It may be asked, secondly, if it is my opinion that they have a right to lay down rails on the narrow gauge, why do I restrain them from doing so? My answer is, that, although I think that if the Company meet and resolve, as an abstract proposition, that it will be for their interest to

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lay down a narrow gauge line of rails, they may do so; yet I think, that they cannot do it in pursuance of the agreement which they have made with the London and North Western and Midland Counties Railway Companies; because, in my opinion, that agreement is quite illegal; and I do not know what arrangement the Oxford, Worcester, and Wolverhampton Railway Company would have made, if it had not been for that agreement; and for this reason I do not think that the question, whether they may lay down a continued narrow gauge line of rails really arises in the case; for, whether they can make such a line or not (though it is my opinion that they can), I am sure that they cannot make it pursuant to this agreement. My reason for thinking so is, that, having agreed to make a narrow gauge line throughout, except in a particular place, (where it is to be only single for a certain space), they go on to say this: "The whole concern, without incumbrance, when completed, to be worked by the London and North Western and Midland Counties Railway Companies, who shall have perfect control, and exercise all the rights of the Oxford, Worcester, and Wolverhampton Railway Company, and who shall find stock, and work the concern for twenty-one years on the following terms: The gross receipts from such sources to be carried to a common fund, out of which the following charges are to be paid in the order stated—1st. 53,000*l.* per annum (or it may be eventually 60,000*l.*) to the Oxford, Worcester, and Wolverhampton Railway Company, to provide for debentures and preference shares;" and so on.

In my opinion this is neither more nor less than a contract on the part of the Oxford, Worcester, and Wolverhampton Railway Company, that when their line is completed they will hand it over to be worked by the London and North Western and Midland Counties Railway Companies. I put the question several times to the counsel who appeared to protect different interests; and I do not think that any of them construed it quite the same way;

In my opinion it is just the same thing, practically, they had leased the line to the two other Companies because, what they say is not, that the Midland and London and North Western Railway Companies are to run their trains upon the line, but that the line, when completed, is to be worked by the London and North Western and Midland Counties Railway Company, who shall have the control, and exercise all the rights of the Oxford, Worcester, and Wolverhampton Railway Company. However, the case will be stated for the opinion of a Court of law. In this agreement, I shall not make any further observation upon it, than that in my opinion, by it, the Oxford, Worcester, and Wolverhampton Railway Company are delegating the function which the legislature has given them to other parties, which they have no possible right to do. For the security of the public, a great many duties are imposed on Railway Companies. They are bound to have engine-masters and policemen, and proper persons to attend to the signals. A variety of other duties are also imposed upon them in which the public are concerned: and although it was said that there was nothing in the agreement to prevent the construction that the Oxford, Worcester, and Wolverhampton Railway Company are still to do all these things; and that the meaning of the contract was that the London and North Western and Midland Counties Railway Companies are merely to run their cars on the Railway—I must say, I think it is idle to suppose that that was the meaning. The Act requires a great many things to be done by this incorporated Company, which the Company have agreed shall be done, not by themselves, but by the London and North Western and Midland Counties Railway Companies; therefore, in my opinion, the agreement is illegal. And I do not think that the view of it is at all varied by the circumstance, that the Oxford, Worcester, and Wolverhampton Railway

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Company were about to put their seal to it, they appended the following resolution:—"That this Company retain power to insure the full development of the traffic of the line in a manner satisfactory to the board." After they have delegated to others the full right of working the Railway, with all the powers they had themselves, it would be difficult, according to any definition of the term "development," to say, that they could exercise and fulfil their powers, and perform all their engagements. I think that what they meant by that resolution was, that, if they found that the London and North Western and Midland Counties Railway Companies were playing them false, and not sending a due proportion of the traffic that was coming from beyond Wolverton up to London, through the Oxford, Worcester, and Wolverhampton line, but taking more than a fair share over the old Birmingham line, then they might call them to account for so doing. That, I think, is the meaning of the resolution; it clearly cannot annul (for that was the argument) all that went before; if that were so, it would neutralise the whole, and make the agreement a nullity; and therefore it is impossible to put that construction upon it. For these reasons, which I have stated shortly, I think that the agreement is void; and that I ought to restrain the parties from carrying into execution that part of it at least, which, if I do not restrain them, may cause what we call, for want of a better expression, irreparable injury, that is, the expenditure of money which it will be impossible, perhaps, ever to get back again.

That is the view I take of the case; and, having said so much, it is not strictly necessary for me to say more. My view is, that it would have been competent to the Company to have sanctioned a double or single narrow gauge line throughout; but that it is not competent for them to enter into this agreement; and that being the case, I cannot permit a narrow gauge line to be made in pursuance of an agreement, which is in itself altogether void.

With regard to the other part of the argument, namely, that the Oxford, Worcester, and Wolverhampton Railway Company is bound to the Great Western Railway Company, I confess I have not felt at all satisfied of that; and although it is not necessary for me to decide that matter, because I am of opinion, that, on the other ground, I ought to restrain the defendants, yet it may be more satisfactory to do so. No doubt great powers have been given to the Great Western Railway Company with reference to the other Company, but those powers are all defined. They are to have the right of taking a very large quantity (about 750,000*l.* worth) of shares. They are to have, whether they take the shares or not (as I read the Act), six of their own body as directors of this body. They are empowered to take a lease of the Railway; and it is to be constructed in all respects to the satisfaction of their engineer; and the gauge of it is to be such as to admit of its being worked continuously by them; and one or two other powers are given to them, but they are all defined; and I do not think that there is anything in the Act which prevents the Oxford, Worcester, and Wolverhampton Railway Company from doing that which might be thought by the Great Western Railway Company to be prejudicial to their interests, if it is not necessarily in contravention of the clauses particularly relating to that Company.

With regard to the agreements between those two Companies, I do not think there is now any binding one. Perhaps at one time there was. I allude to the agreement of the 20th of September, 1844, which was entered into before the Act passed, but after the Company was formed. And when it was found that a vast deal more money than was originally supposed was required to make the Railway, that agreement was abandoned by common consent, as impossible. Then they applied to the Great Western Railway Company to guarantee to them a much larger amount of rent than they had originally stipulated for, and to grant

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them more beneficial terms for the lease of their Railway in other respects. And the Great Western Railway Company took the application into consideration, and passed certain resolutions, which shewed their willingness to comply with it, to some extent at least; but the Oxford, Worcester, and Wolverhampton Railway Company do not appear to have done anything, in consequence of those resolutions, beyond empowering their directors to enter into an agreement with the Great Western Railway Company, subject to such conditions as might seem equitable. Under these circumstances, it does not appear to me that there is any binding agreement now existing between the Great Western and the Oxford, Worcester, and Wolverhampton Railway Companies.

The order which I shall make is, that a case be stated for the opinion of a Court of law as to the validity of the agreement between the Oxford, Worcester, and Wolverhampton Railway Company and the London and North Western and Midland Counties Railway Companies; and that, in the meantime, the Oxford, Worcester, and Wolverhampton Railway Company be restrained from doing any act for or towards carrying into effect so much of that agreement as relates to the laying down of rails on the narrow gauge on any part of the Oxford, Worcester, and Wolverhampton Company's line, except that part of it which is specified in the 44th section of their Act.

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BEFORE THE VICE-CHANCELLOR OF ENGLAND,
AND THE LORD CHANCELLOR (a).

THE HUNGERFORD MARKET COMPANY v. THE CHARING-
CROSS BRIDGE COMPANY.

Jan. 28th.
Feb. 1st &
24th.
March 10th.
June 12th.

THE bill in this case, filed on the 11th of January, 1847, stated, that, by an Act of Parliament, 11 Geo. 4, c. lxx., a Company was incorporated, to be called "The Hungerford Market Company;" and they were thereby empowered (among other things) to inclose and embank a piece of ground, part of the soil or bed of the river Thames, and to make a new causeway and convenient stairs or steps for the landing and embarkation of passengers and goods; and to demand, recover, and receive from passengers landing from or embarking on steamboats or other vessels, certain tolls in the said Act specified.

That, by an Act of Parliament passed in 1836, the Company were empowered to remove the existing causeway, and to build or construct a jetty, causeway, or moveable landing place, raft or float, upon or to the western end or extremity of the wharf belonging to the Market, and to take tolls, but those powers had not been exercised.

That, in the same year, a scheme was formed for constructing a Suspension Foot-bridge from the northern to the southern side of the river Thames, to join the wharf of the Hungerford Market Company, the access to which was to be over the property of the Hungerford Market Com-

By Act of Parliament incorporating the Charing-Cross Bridge Company, they were empowered to build a bridge and erect toll-bars south of a defined line. By a lease entered into between the Bridge Company and the Hungerford Market Company, the Bridge Company covenanted that all passengers embarking or disembarking from steamboats, and their servants, with or without luggage, &c. should have free access and right of passage from the market to a pier or landing-place, to be erected by the Bridge Company, without paying toll for

the use of that part of the suspension bridge lying between the market and the pier. The Bridge Company built their bridge and placed toll-gates at the northern extremity of it and south of the defined line, through which all persons going to the steamboats must pass. They also blocked up the entrance to the pier, alleging, that the Market Company were bound to identify, by tickets or otherwise, the steamboat passengers from the general public. The Market Company moved for an injunction to restrain the defendants from hindering the plaintiffs from having the benefit of their covenant, and from obstructing passengers going to or from the steamboats. The Vice-Chancellor refused the injunction, but left the plaintiffs to their action at law.

The Lord Chancellor, on appeal, reversed the decision of the Vice-Chancellor, and granted an injunction.

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pany; and, pending the negotiations for advancing this scheme, an agreement was duly made and executed between the Hungerford Market Company of the one part, and the promoters of the Bridge Company of the other part, which contained various stipulations, and, amongst others, one that every endeavour should be made to obtain powers from the legislature for granting the lease therein referred to and hereinafter mentioned.

That, by an Act of Parliament, (6 & 7 Will. 4, c. cxxxiii.), The Hungerford and Lambeth Suspension Foot-bridge Company were incorporated, and empowered to build and maintain a bridge for foot passengers from Hungerford Market over and across the river Thames; and the Hungerford Market Company were empowered to give, under their common seal, to the Bridge Company leave and liberty to build upon or about the market and wharf such fixtures, pier or piers, towers, and other works, as might be necessary for the construction of the bridge and the northern approach thereto, and to grant them a lease for such term and subject to such conditions &c. as the Companies might agree upon.

That, by the same Act, after reciting that it was in contemplation that the northern pier of the intended bridge should be and constitute a landing place for passengers, instead of or in addition to the wharf or causeway, it was enacted, that it should be lawful for the Hungerford Market Company to levy and receive for each passenger and all luggage embarking or disembarking from the said pier or landing place, or any float attached thereto, tolls of the same amount as authorised by the Hungerford Market Act; but nothing in the Act was to empower the landing of any goods, wares, or merchandise, or articles of trade or business, without the special consent in writing of the Suspension Foot-bridge Company; and the Hungerford Market Company were empowered to appoint constables at their own expense for keeping order on and managing that

part of the intended bridge which should be appropriated or railed off for the communication from the Hungerford Market to the pier or landing place.

That, by the same Act, it was enacted, that the Bridge Company might erect and set up a toll-gate or toll-gates at any place upon any part of the bridge or approaches; but that nothing therein contained should extend to or affect any rights, property, or privileges of the Hungerford Market Company, or be construed to invest the Bridge Company with any right to use or appropriate the same or any part thereof, without the consent of the Hungerford Market Company.

That, by Acts of Parliament passed in the 6th & 7th Vict. c. xix., and the 8th & 9th Vict. c. lxii., further powers were granted to the Bridge Company; and, by the latter Act, they were required to use the name of The Charing-Cross Bridge Company as their name of incorporation; but it was provided, that such change of name should not vary their rights or liabilities.

That negotiations were carried on for some time as to the form of the lease to be granted by the Market to the Bridge Company; and ultimately, on the 1st of November, 1842, after the passing of the last-mentioned Act of Parliament, a lease, which was to the following effect, was duly executed, under the seals of the respective Companies, (the Market Company being therein designated as "the lessors," and the Bridge Company "the lessees"): The lessors granted unto the lessees full and free leave, liberty, license, power, and authority to build, construct, and place, in, upon, or about Hungerford Market, and the wharf or river side of the Market, such fixtures, piers, &c., as might be necessary or requisite for the effective construction, maintenance, and support of the foot-bridge and the northern approach thereto, and to put up and erect toll-bars and toll-houses on the bridge or the works thereof south of the line of the front of the tavern; and the lessors gave

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to the lessees, for a term of 99 years, first, full power, license, and authority, from time to time, to keep and maintain the fixtures &c.; and, secondly, a free, clear, uninterrupted, and unobstructed right of way and passage through, over, along, and across the Market from the bridge to the Strand. The lessees on their part covenanted with the lessors, that they would build the bridge in such manner as that the same might, with the float thereafter mentioned, afford a fit landing place for passengers from steamboats &c., and would provide a fit and sufficient float or raft for the use of such passengers, together with all suitable steps, staircases, and other conveniences fit for establishing an easy and commodious passage and communication between the pier and the Market: And it was declared, that the float should be first placed and provided at the expense of the lessees, but should be afterwards the sole property of the lessors, and kept up at their expense; and that all tolls to be received in respect of the float or landings should belong and be paid to the lessors: And it was further declared, that all passengers, and their servants, with or without luggage, and also the servants and agents of the lessors, with or without trucks, or hand or wheel-barrows, should have free access and right of passage to and from Hungerford Market, the said pier, and the part of the bridge constituting such landing-place, without toll for the use of that part of the bridge situated north of the pier, which was to be railed off for the communication from the market to the float, except that charged and demandable by the lessors: And it was further agreed and declared, that it should be lawful for the lessees, if they should think fit, from time to time to make and appropriate, for the purposes therein aforesaid, a way or passage of not less than six feet in width of the foot-bridge extending from the Market to the northern pier. And it was declared, that nothing therein contained should restrict the lessees from demanding and taking tolls for their own use and benefit, for steamboat

passengers coming from or going to the Surrey side of the bridge.

That the bridge was opened for traffic on the 1st of May, 1845, and that frequent communications passed between the two Companies, the Market Company requiring free access to the float or pier, and the Bridge Company calling upon the Market Company to make some arrangement, whereby the steamboat passengers might be distinguished from the public in general. The Bridge Company also suggested that the steamboat passengers should go to the boats by a separate way from the wharf, and disembark only by the pier and bridge.

That, pending these negotiations, the plaintiffs used a temporary passage over barges, for the purpose of enabling passengers to embark and disembark; but such passage was only permitted by the sufferance of the river authorities; and that, on the 31st of March, 1846, the plaintiffs had been called on to remove the same.

That further negotiations and resolutions were passed by the directors of both Companies, but no definite arrangement was come to.

The bill alleged that the Bridge Company altogether declined to observe and keep the covenants in the lease, and obstructed all access from the float to the bridge, by means of hoardings of wood fixed on the northern side of the northern pier, so as to block up the approaches at both ends of the staircase leading from the float to the bridge; and that the defendants had also constructed toll-houses and tell-tales at the extreme northern end of the bridge, with an iron-gate in the centre less than six feet in width, which centre gate was kept locked or fastened; and that no person could go on the bridge without passing through the tell-tales one by one, which obstructed the free passage. That the number of passengers in one day amounted to 15,000, and to upwards of two millions in the year 1846.

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The bill prayed that the defendants, the Charing-Cross Bridge Company, &c., might be restrained, by injunction, from further hindering the plaintiffs from enjoying and having the benefit and advantage of the liberties, rights, and privileges reserved or granted, or agreed to be reserved or granted to them, by the said indenture of lease of the 1st of November, 1842, on their the said defendants' part, either by continuing to keep the said iron-gate at the said northern or Hungerford Market end of the said bridge locked, bolted, fastened, or shut, or the said hoardings or any other obstacles or obstacle fixed or fastened, so as to impede free access from the said Hungerford Market along the said bridge and down the said stairs to the float, or from the said float up the said stairs and along the said bridge to Hungerford Market aforesaid or otherwise, and from obstructing or continuing to obstruct all or any passengers or passenger to or from any steamboats or steamboat, or their or any of their servants, with or without luggage, or the servants or agents of the said plaintiffs, their successors and assigns, with or without trucks and barrows or wheel-barrows, from having free access and right of passage to and from Hungerford Market, the northern pier, the stairs and landing place, and the float, or any part of the suspension bridge, constituting or forming part or incidental to the use and enjoyment of the said landing and landing place, and from in anywise acting contrary to the covenants, declarations, and agreements contained in the said lease, and so entered into as aforesaid on the part of and by the defendants; and that at the hearing of this cause the injunction may be made perpetual.

The plaintiffs moved for an injunction in the terms of the prayer of the bill.

Mr. *Bethell* and Mr. *G. M. Giffard*, for the plaintiffs, in support of the motion, contended that they were entitled, by the covenant in the lease, to a free and uninterrupted

access to the pier or float. That the whole purport and intention of the lease was to give the plaintiffs either the free use of the bridge up to the northern pier, or to rail off a passage of six feet for their separate use. That a Court of law would not import into a covenant of this description an implied obligation on the party who was to have the benefit of it. That it was one thing for the Court to effectuate the intention of the parties to the extent to which they might have been imperfectly expressed, and another to add to the instrument such covenants as the Court might deem fitting and convenient: *Aspdin v. Austin* (a). That a Court of equity would grant an injunction in the nature, or having the effect, of a decree for specific performance: *Barret v. Blagrove* (b). That the agreement, the Act of Parliament, and the lease, all reserved to the Market Company an uninterrupted passage to the pier, and this the plaintiffs required at whatever inconvenience to the defendants. That the prayer of the bill was in conformity with that in *Lane v. Newdegate* (c). That the rights of the plaintiffs were so clear that there was no reason for sending the case to law; but that, if the Court should be of opinion that an action should be brought on the covenant to establish the legal right, the plaintiffs were, at all events, entitled to an interim injunction. That the whole purport of the lease was to give the plaintiffs either the free use of the bridge up to the northern pier, or to rail off a passage of six feet.

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Mr. *Rolt* and Mr. *Bigg* for the defendants, the Bridge Company, contended that the plaintiffs could not avail themselves of the benefit of the covenant without undertaking all the obligations and duties necessarily attached to it. That, by the words of the lease, the defendants were entitled to have toll-bars in the places where they then had been erected, being "south of the line of the front of the tavern;" and, tolls being clearly contemplated, "free

(a) 5 Q. B. 671.

(b) 5 Ves. 555.

(c) 10 Ves. 192.

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access" must only mean freedom from toll, not that the toll-gates should be removed. That, if the defendants had put up toll-gates where no tolls had been contemplated, it might be contended that the gates were an obstruction; but it never was intended that the defendants, the Bridge Company, should be compellable under the covenant to open their bridge to all the world, because a certain class, namely steamboat passengers, were to have free access to the pier; that persons, mere loungers, were in the habit of frequenting the piers who never intended to embark; and that it was never the intention or meaning of the covenant that they were to be admitted free. That the plaintiffs might avail themselves of their covenant, but not so as to injure the defendants' property. That the plaintiffs had no right to call on the defendants to remove their toll-bars back over one third of the bridge, or to rail off six feet for their accommodation. That the legal rights of the plaintiffs were at all events doubtful; and that the plaintiffs should be put to establish their right at law before any relief was granted in a Court of equity. That, on the balance of inconvenience, the plaintiffs could not be damnified by being obliged to use the passage of boats until the legal question had been determined, while it would be impossible to estimate the loss to the Bridge Company by being obliged to open their gates gratis to all the world.

The VICE-CHANCELLOR (without hearing a reply).—It strikes me, that it is not the duty of the Court to be the interpreter of legal rights. If there had been a long user in a particular manner, that would *primâ facie* be evidence, that there was a right according to the usage; but that is not the case here. It strikes me that the safest thing I can do at present is, not to issue an injunction, but to direct that the motion stand over, with liberty to the plaintiffs to bring such action or actions as they may be advised, with liberty to either party to apply.

plaintiffs now renewed their motion by way of appearance before the Lord Chancellor. The same counsel as in the case below argued the case.

LORD CHANCELLOR (*a*), in the course of the argument, stated that the defendants could not impose on the plaintiffs an impossible condition; that it did not appear to be possible for the plaintiffs to identify persons passing over the northern extremity of the bridge as steam-passengers. That the reservation of railing off six feet was introduced as an easement to the Bridge Company, which very strongly implied that they had entered into a larger covenant before, but had reserved to themselves the means of being relieved from it by another arrangement.

The motion then stood over, to see whether the parties could by mutual arrangement, settle their differences.

After an arrangement having taken place, his Lordship made the following order:—

That the order made by his Honour the Vice-Chancellor of the High Court in this cause, dated the 1st day of February 1847, be discharged; and the plaintiffs, by their counsel, taking to stop up all passage from the line of barges to the bill mentioned to the float attached to the northern end of the Charing-Cross Bridge, in the bill mentioned: ordered, that the defendants, the Charing-Cross Bridge Company, their servants, agents, and workmen, be restrained, by the injunction of this Court, from continuing the obstructions in the bill mentioned, or either of them, and from obstructing or impeding the free access and right passage of all passengers, and their servants (with or without baggage), or the servants and agents of the plaintiffs (with or without trucks, hand-barrows, or wheelbarrows), to and from Hungerford Market, the said northern extremity, and the part of the said Charing-Cross Bridge,

(*a*) Lord Cottenham.

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constituting or forming part of the landing-place in the bill mentioned, either by keeping the gate at the northern end of the said bridge locked or fastened, or in any other manner, until the defendants shall fully answer the plaintiffs' bill, and the Court make other order to the contrary.

June 12th.

[By consent, this injunction was made perpetual, and further proceedings in the suit stayed, on the defendants paying the plaintiffs their costs.]

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 Nov. 18th,
 21st, & 25th.

BEFORE VICE-CHANCELLOR SIR G. J. TURNER, AND
 THE LORDS JUSTICES.

1852.
 Feb. 14th,
 17th, & 24th.
 March 3rd.
 May 4th &
 8th.

SPARROW v. THE OXFORD, WORCESTER AND WOLVERHAMPTON
 RAILWAY COMPANY.

A Railway
 Company, in-
 corporated in
 1848, had in-
 cluded in their
 deposited plans,

THE bill, which was filed on the 10th of September, 1851, stated, that, on the 14th of June, 1848, the plaintiff became, and had ever since been, the owner in fee-simple

and described in their books of reference, the whole of A.'s property, of which, however, only a small triangular piece of land was within the limits of deviation. A., after the passing of the Act, erected sheds and buildings on this piece of land. The Railway Company, in 1851, served the usual notice on A. of their intention to take the land included within the limits of deviation. A. thereupon served on the Company a counter notice, stating that the piece of ground which the Company had given notice to take, was part of a manufactory; and that, if they took any part of his property, they must take the whole, under the 92nd section of the Lands Clauses Consolidation Act. The powers of the Company to take land compulsorily expired shortly after the delivery of the notice. The Railway Company were about to enter on A.'s property under the provisions of the 85th section of the before-mentioned Act, when A. filed his bill praying an injunction to restrain them from taking a part unless they took the whole of his manufactory. The Vice-Chancellor *held*, that, as the powers of the Company to take land compulsorily had not ceased when the notice to take was given, the Company were not precluded, by the subsequent expiration of those powers, from entering and completing possession of the land; and that the 92nd section of the General Act was not applicable to or consistent with the provisions of the Company's Special Act. He therefore refused the motion for an injunction.

The plaintiff having renewed his motion, by way of appeal, before the Lords Justices, their Lordships granted an injunction to restrain the Company from doing any act affecting the land, until they had established their title at law to take a part, or were willing to take the whole of the manufactory.

The parties having afterwards agreed to have the cause brought to a hearing on affidavits, the Court made an order for that purpose; and the legal and equitable questions having, by consent of parties, been submitted to the Lords Justices:—*Held*, that the 92nd section of the Lands Clauses Consolidation Act was incorporated into the Special Act, and was not inconsistent with it; and that the piece of land which the Company had given notice to take, was part of a manufactory. That the interim injunction must therefore be made perpetual.

Sembla, that fraud or unfair intention will not weigh with the Court, unless it be shewn that thereby the complainant has been induced to pursue a particular line of conduct which he would not otherwise have pursued.

f an iron and tin-plate manufactory, situate at Wolverhampton, consisting of forges, mills, and, among other things, of a wharf, canal, basin, and occupation road.

That the premises were built on an oblong piece of land, extending about 89 yards on the south side, about 100 yards on the north side, 173 yards on the west, and about 182 yards on the east side; and that the only ingress and egress for carriages or horses was at the western and south-western corner; and that from the south-western corner a private or occupation road, for communicating with the several works and buildings, and with the Birmingham Canal navigation, ran about 148 yards along and within the western boundary of the premises.

That, by an agreement entered into between the plaintiff and Henry Crane, the plaintiff agreed to permit a side line to be made over the occupation road, hereinbefore mentioned, from the Birmingham, Wolverhampton, and Stour Valley Railway; and that the said Henry Crane should have free right to use the occupation road; and that, in consideration thereof, Crane should allow the plaintiff to make the branch line from his works into the side line, and at all times thereafter to use the same, and also a side line to the depot of the Birmingham, Wolverhampton, and Stour Valley Railway.

That, by an Act, (8 & 9 Vict. c. clxxxiv.), the Oxford, Worcester, and Wolverhampton Railway Company were incorporated; and by another Act (11 & 12 Vict. c. cxxxiii.) of which the Lands Clauses and other general Railway Acts formed part, it was enacted, (section 13), that such part of the Railway as should pass through any of the several plots, pieces, or parcels of land in the parish of Wolverhampton, numbered 159, 160, 161, and 161a, on the plan there referred to, and so much of the piece of land numbered 158, as thereafter defined, should be arched or covered over; and the top or upper surface of the ground above such arching or covering over should not exceed, at

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the north western end of such part of the Railway, 17 feet, nor at the south eastern end 22 feet above the level of the rails of the Railway, as shewn upon the section deposited with the clerk of the peace; and the upper surface of the ground above such arching or covering should be a regular incline in the direction of the line of the Railway; and such arching or covering was to commence from the centre of the south eastern pier of the sixth arch of the Birmingham, Wolverhampton, and Stour Valley Railway Viaduct, then erected, reckoning from the north western end thereof, and was to be made square therewith; and such arching or covering was to be constructed in such manner and of such strength, as should make it sufficient to bear and carry over and upon the same, a branch railway or branch railways, to be worked by horse power; and in case of difference as to the manner of the construction or strength of the arching, the same was to be settled by arbitration; and, by the 14th section, it was enacted, that the owner or owners for the time being of the said several plots, pieces, or parcels of land, should have and enjoy the same powers, rights, privileges, easements, and authorities, over, above, and upon the upper surface of the said arching or covering, including the power of making, maintaining, and working the said branch railway or railways, to be worked by horse power, over and upon the said arching or covering, as the said owner or owners or other persons then had. And it was provided, that the owner or owners should not be at liberty to erect upon the said arching or covering any buildings without the consent in writing of the Company, or to erect or place any building or machinery on the adjoining land belonging to Crane and Bailey, or either of them, so near to the said Railway as to affect in any manner the stability of the works thereof, without the like consent in writing. And by the 36th section, it was enacted, that the powers of the Company for the compulsory purchase of lands, for

the purposes of that Act, should not be exercised after the expiration of three years from the passing of the Act.

That, for the purposes in the Lands Clauses Consolidation Act, and, subject to the provisions thereof, the Company were authorised and empowered to take and use the premises occupied by the plaintiff; and that the manufactory and premises were delineated and described in the plan referred to in the special Act, and were therein numbered 161, and part thereof was in the line of Railway by the last-mentioned Act authorised to be made, and other parts thereof within the limits of deviation authorised by the same Act; and that the said premises were those referred to in the 13th section, hereinbefore set out, by No. 161.

That the Railway Company afterwards obtained from Parliament an extension of time for completing their Railway, and, on the 25th of June, 1851, gave notice to the plaintiff that they required 19½ perches of No. 161 a; and they also at the same time delivered another notice to Crane and the plaintiff, that they required the same quantity of land of No. 161 a, also referred to in the plans.

That the said pieces of land were parts of the plaintiff's manufactory and premises, and essential to the enjoyment thereof; and that the taking and using of the said pieces of land would cause irreparable damage to the manufactory, and, in particular, would cause the destruction of a scrap-house, annealing room and oven, weighing machine, machine-house, lathe-house, engine-house, and millwright's shop, all of which were essential to the manufactory.

It appeared in evidence, that the last-mentioned buildings had been added to the manufactory after the passing of the Company's Act, but before any notice had been delivered to the plaintiff. The bill further stated, that the formation of the Railway would cause a permanent injury to the occupation road, and prevent the plaintiff from having any road within the manufactory sufficiently commodious for the use and enjoyment thereof.

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That, on the 5th of July, 1851, the plaintiff, in reply to the two notices, sent two notices to the solicitors of the Railway Company, stating, that he could not be required to sell or convey to the promoters of the Railway Company a part only of the manufactory; and that he was willing and able to convey the whole, and claimed 60,000*l.*, exclusively of any claim which Crane might have in respect of the grant made to him by the plaintiff. After setting out a correspondence which took place between the parties, the bill stated, that, on the 14th of August, the Railway Company caused a bond, bearing date the 13th of that month, to be delivered to the plaintiff, whereby the Company, with two sureties, became bound to the plaintiff in the sum of 500*l.*; 150*l.*, part thereof, as the purchase in fee simple of the premises, and 350*l.* as compensation for the injury to be sustained by severance; and they paid that amount into the Bank of England. The schedule to the defeasance was in the following words:—

<i>No. in Plan.</i>	STATE OR DESCRIPTION.	<i>Quantity.</i>
161	Yard and occupation road, steam-engine, roll, lathe, and buildings; Carpenters' shop, weighing machine, office, annealing furnaces, and scrap-house, and occupation road.	19½
161a	Occupation road and wall.	15½

That the plaintiff protested against the right of the Company to enter.

The bill then set out a lengthened correspondence between the parties; and further stated, that the Company threatened and intended to enter upon and use the said pieces of land, without taking the whole of the manufactory.

That the Company had not proceeded further with the compulsory purchase; nor taken any other measures than those before mentioned towards entering or obtaining pos-

on of the pieces of land required by them, within three
from the passing of the Act of 1848.

e bill, as amended (a), further stated, that the plain-
ad contracted for the purchase of the manufactory, in

1847; and that it had been conveyed to him in June,
; and that he had not heard, and had no reason to
ve or suspect, that the undertaking authorised by the
rd, Worcester, and Wolverhampton Railway Deviation
which passed in August, 1848, was projected, until
he had entered into his contract for the purchase of
manufactory.

at the plaintiff petitioned the House of Commons
st the bill, and therein stated, that the proposed line
d destroy the road into his works and tenements, and
ent any approach thereto, and would also render it
ssible for him to enjoy the siding from his works
; the Stour Valley line, and would also take from
a considerable and most valuable portion of the yard
hed to his manufactory, and prevent his works from
; efficiently carried on.

at the Company then endeavoured to induce the plain-
ot to prosecute his petition against the bill in Parlia-
, and he then made a statement of the terms on which
ould withdraw his opposition; but those terms were
ccepted by the Company. That the plaintiff did not,
ver, oppose the said bill in the House of Commons,
fterwards petitioned the House of Lords against it,
hat he did not proceed further with his opposition,
he bill passed into an Act.

at, with the view of improving the manufactory, the
tiff did, after the completion of his purchase, make
ations, additions, and improvements, and erected
lings on the projected line of railway, and within the
s of deviation, consisting of a scrap-house, an anneal-

The bill was amended after
aring of the motion on ap-
before the Lords Justices,

and under the order then made.
See p. 113, *infra*.

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ing-room, a weighing-machine and machine-house, a roll-lathe and house, an engine and engine-house, and a mill-wright's shop; and that such buildings could not, with due regard to the exigencies of the manufactory, have been erected elsewhere than where they were placed.

That the notice of the 25th of June, 1851, was a surprise on the plaintiff, as he had considered that the Railway undertaking had been wholly abandoned.

That Henry Crane was the owner of the hereditaments numbered 159 and 160 on the plans, which adjoined the plaintiff's manufactory, and were the hereditaments in respect of which, by agreement dated the 26th of July, 1847, it was provided, that the said Henry Crane should have the right to lay a portion of a side line on, and to use the occupation road of the plaintiff within the manufactory; and that William Bailey was the owner of hereditaments adjoining those belonging to Crane, and were part of the hereditaments through which the arching or covering mentioned in the 13th section of the Act was to pass.

That Henry Crane and William Bailey, and not the plaintiff, procured the insertion of the clauses numbered respectively 13 and 14.

The bill then prayed, that the Oxford, Worcester, and Wolverhampton Railway Company might be restrained by injunction from entering upon or taking possession of the pieces or parcels of land and hereditaments required by them in the notices of the 25th of June, 1851, or mentioned in the schedule to the defeasance of the bond, and from committing any waste or spoil thereon, and from proceeding to take any measures to acquire the said pieces or parcels of land by compulsory purchase, or at least that they might be so restrained, unless they at the same time proceeded to purchase the whole of the aforesaid manufactory, and to make compensation to the plaintiff for all the damage to be sustained by him in consequence of the taking of the said manufactory.

It appeared from the affidavits and plans, that the scrap-shed, annealing-house and wheelwright's shop, although used in connection with the manufactory, were all of them distinct buildings, separated from the manufactory by an open space of ground; and that the land occupied by the manufactory was between three-and-a-half and four acres in extent.

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The defendants, by their affidavits, stated, that one-third of the space occupied by the manufactory was open ground, and that the buildings in question could easily be erected on other parts of the premises; and that such buildings were not essential to the use of the manufactory.

The plaintiff now moved for an injunction in the terms of the prayer of his bill.

Nov. 3rd.

The *Solicitor-General* and Mr. *Shapter* in support of the motion.

Mr. *Rolt* and Mr. *Bovill* contra (a).

The VICE-CHANCELLOR.—In the view which I take of the case, it is not necessary for me to enter into the affidavits which have been filed upon the motion. It is enough to state, that, in my opinion, they establish that there is sufficient ground for the interference of the Court, if the case were to be decided on the question of comparative injury.

This motion asks for the summary interference of the Court, to prevent the exercise of an alleged legal right, upon the ground that the right either does not exist or is doubtful, and that irreparable injury will ensue by permitting it to be exercised.

In cases of this nature, I think it is the duty of the plaintiff to satisfy the Court that there are substantial grounds for doubting the existence of the legal right. If,

(a) The arguments of counsel are given before the Lords Justices, *infra*, pp. 114 et seq.

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on the one hand, the Court is satisfied that such grounds exist, it is bound to interfere for the protection of the property. If, on the other hand, it is satisfied that no such grounds exist, it is not less bound to withhold its interference. However irreparable the injury to parties may be, this Court has no power or right to prevent it, if it be sanctioned by the law. I have felt it incumbent on me, therefore, to consider this case with reference to the legal rights of the parties.

The plaintiff's case rests upon two points: first, that the Company have not now any right to take any part of these lands; and secondly, that, if they have the right to take any part of the lands, they are bound to take the whole of the plaintiff's manufactory.

The first point depends, I think, entirely upon the construction of the Lands Clauses Consolidation Act, whether the defendants' powers of entry and of purchase subsist after the expiration of the period prescribed for the compulsory purchase or taking of lands; and I think it clear that both these rights subsist, unless they are taken away by the 123rd section. The question, therefore, is reduced to this, whether the 123rd section does or does not abrogate these powers. In determining this question, it is necessary, in the first place, to consider the frame of the Act; and upon examination, it will be found to stand thus: After some provisions relating to purchases by agreement, the Act proceeds to deal with the case of the purchase and taking of lands otherwise than by agreement; and sections 18 & 21 provide, that, when the promoters require to purchase or take any of the lands, they shall give notice to the parties interested, and demand the particulars of their estate in the lands, and of their claims in respect thereof; and that, if the particulars be not furnished in twenty-one days, or if the parties do not agree as to the amount of compensation to be paid, the amount of such compensation shall be settled in manner thereafter provided for settling cases of disputed compensation; the enactment for such

settlement being imperative. Sections 22 & 23 provide the manner of settling cases of disputed compensation: if the claim be under 50*l.*, by justices; and if above 50*l.*, by arbitration, at the election of the land-owner, and otherwise, by the verdict of a jury. Section 24 points out the course of proceeding before the justices in the cases of claims under 50*l.* Sections 25 to 37 relate to the course of proceeding before arbitrators, where the claims are to be settled by arbitration: they are imperative on the promoters as to the appointment of arbitrators, and other matters connected with the arbitration. Sections 38 to 57 relate to the proceedings before a jury, where the claims are to be settled by jury, and are, in like manner, imperative on the promoters as to summoning the jury and other matters connected with those proceedings. Sections 58 to 67 point out the course to be pursued for ascertaining the compensation where the landowner is prevented from treating by absence from the kingdom or cannot be found. Section 68 provides the means for ascertaining the compensation, where the lands have been taken without satisfaction having been made. Sections 69 to 83 provide for deposit of the purchase-money, as to which the enactments are also imperative, and for conveyance of the land; giving power to the promoters, after deposit of the purchase-money, to vest the lands in themselves, by the execution of a deed poll, if the conveyance be not made or a good title be not adduced. Sections 84 to 91 relate to the entry upon and possession of the lands; the 85th section, being the section under which the defendants are now proceeding, gives power to the promoters to enter upon lands, on depositing in the Bank the value claimed by the landowner or ascertained by a surveyor, and giving a bond with two sureties for the same amount, conditional for payment of the purchase-money or compensation, to be ascertained in manner before provided. And section 91 gives power to the promoters to issue their warrant to the

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sheriff to deliver possession, where the landowner refuses to give it up. These sections are followed by several others, having relation to particular cases, not material to the present question; and we then come to the 123rd section, which is as follows—"Be it enacted, that the powers of the promoters of the undertaking for the compulsory purchase or taking of lands for the purposes of the special Act shall not be exercised after the expiration of the prescribed period, and, if no period be prescribed, not after the expiration of three years from the passing of the special Act.

It appears, therefore, that this clause is preceded by clauses which relate in succession, first, to the purchase; secondly, to the ascertainment of the price to be paid; thirdly, to the payment of the price; fourthly, to the conveyance or vesting of the land in the promoters; and fifthly, to giving the promoters the possession; and as I have already observed, these clauses, so far as they are for the benefit of the landowner, are imperative upon the promoters. By the 18th section, where they require to purchase or take the land, they are to give the notice, leaving it to their discretion whether they give the notice or not; but, by the 21st section, when they have given the notice, and no agreement is made within the limited time, the enactment is imperative that the compensation shall be settled in manner after provided; and the provisions for the settlement and payment of it are equally imperative.

Independently, indeed, of the language of the Act, the cases which have been decided upon it leave no doubt of the imperative obligation upon the promoters; for they have decided that the notice creates the relation of vendor and purchaser, and that the promoters cannot recede from it after it has been given. After the notice is given, the promoters are compellable to ascertain and pay the price; and it does not appear to be a very reasonable con-

struction of the 123rd section, to hold that it utterly destroys their power to acquire the property for which they have been or may be compelled to pay; of course, however, if this be the only construction which can be put upon the clause, Courts of law and equity must be bound by it, however unreasonable it may be.

It is to be seen, therefore, whether this is the only necessary construction of the clause; and, upon examination, I think it will be found that it is not. The clause is, that the powers of the promoters for the compulsory purchase or taking of lands for the purposes of the special Act, shall not be exercised after the expiration of the prescribed period; and the first question appears to me to be, whether the powers here referred to are intended to be powers given to the several promoters of the several special Acts, or several powers given to the promoters of each special Act. Now this Act was passed for the purpose of being incorporated in different special Acts, and the promoters in this clause and throughout the Act are spoken of in the aggregate. And I think, therefore, that the legislature may well be understood to have referred, and did in fact refer in this clause, to powers given to several sets of promoters, and not to several powers given to one set of promoters; and if that be, as I think it is, the true meaning of the clause, we are at once relieved from the difficulty created by the clause having referred to several powers, when there was no power given to the promoters beyond the power of purchasing, except the powers of summoning juries, and of entry, and so on.

This construction, however, does not remove the whole difficulty of the case. We have still to consider what are the powers of purchasing or taking to which the clause refers. It is evident, I think, that it refers to the powers which are to be found under the head of the purchase and taking of lands otherwise than by agreement. Does it then refer to all the powers which are to be found under that head? I am of opinion that it cannot be held

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to do so. It refers to powers for purchase and taking only; and both the language of the Act imports, and the decided cases settle, that, when the notice is given, a purchase is made. The other powers to be found under this head are not, in the ordinary sense, powers of purchase. They are powers given for the purpose of carrying into effect a purchase already made, and are so treated by the Act.

In the argument upon this part of the case, much reliance was placed upon the word "taking," which is found in this clause. But I think the insertion of that word gives no additional weight to the plaintiff's case. The words "purchase" or "take" are used in the 18th section of the Lands Clauses Consolidation Act; and the sections 58 to 67 of that Act refer to lands which may well be said to be taken, but can hardly be said to be purchased.

Upon the whole, my opinion is, that, the defendants having served the notice, deposited the money, and given the bond, before the expiration of the prescribed period, neither their power to purchase nor their power to enter is gone by the expiration of that period; and that there is not, upon the construction of the Act, any such reasonable doubt upon that question as should induce the Court to grant this injunction. This opinion, however, is at variance with the decision of the late Vice-Chancellor of *England*, in the case of *Brocklebank v. The Whitehaven Junction Railway Company*(a); and it would undoubtedly be great presumption on my part to refuse this injunction in the face of that decision, if it had remained unimpeached; but that decision was dissented from by Lord *Cottenham* in very decided terms; and since his opinion was expressed upon it, two cases have occurred at law, in one of which it was held, that, where the Company had given the notice within the prescribed period, they were bound, at the instance of the landowner, to summon a jury for ascertaining the price, after the expiration of that

() Ante, Vol. 5, p. 373.

period (a); and in the other of which it was held, that, where the Company had taken possession, under the 85th section of the Act, before the expiration of the prescribed period, they were entitled to retain it after that period had expired (b); and in the latter case, a very decided opinion was expressed by the Court of Queen's Bench against the decision in *Brocklebank's case*. I think, therefore, that I should not be justified in giving to that case the weight to which it would otherwise be entitled; and I think so the more strongly, because the last case at law to which I have referred seems to me to go the whole length of the present. The Company, in that case, having been held to be entitled to retain the possession, must surely have been entitled to perfect their title under their compulsory powers; and if the compulsory powers contended for in that case did exist, I can see no possible reason why they should not exist in the present. I must refuse this injunction, therefore, upon the first point.

The second point urged in support of the motion was, that the Company were bound to take the whole of the manufactory; and this point depends upon different considerations. By the 92nd clause of the Lands Consolidation Act, it is enacted, "that no party shall at any time be required to sell or convey to the promoters of the undertaking a part only of any house or other building or manufactory, if such party be willing and able to sell and convey the whole thereof." And it is upon this clause the plaintiff contends that the defendants are bound to take the whole manufactory; some question was raised as to these pieces or parcels of land being part of the manufactory; but I think it unnecessary to decide that point, and I give no opinion upon it. My opinion is, that the 92nd section of the Lands Clauses Consolidation Act is not in-

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(a) Ante, Vol. 5, p. 373: *Reg. v. The Birmingham and Oxford Junction Railway Company*, ante, Vol. 6, p. 628.

(b) *Doe d. Armistead v. The North Staffordshire Railway Company*, 20 L. J., Q. B., 249.

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corporated in the special Act. The special Act incorporates the powers of the Lands Clauses Consolidation Act only so far as they are applicable to and consistent with the powers in the special Act after contained; and I think that the 92nd section is neither applicable to nor consistent with those powers.

By the provisions contained in sections 13 and 14 of the special Act, the part of the Railway passing through No. 161 was to be arched over, and the arching was to be of sufficient strength to bear a railway to be worked by horse-power; and in case the owner and the Company differed as to this, it was to be settled by arbitration; and the owner for the time being of 161 was to have the same power over the upper surface of the arching, including the power of working the railway by horse-power, as he then had over the land. Now, if the 92nd clause be held to apply, the Company must become purchasers of the manufactory; and it must I think be said that the plaintiff would not, in that case, have the same power over the upper surface of the archway as he now has over the land, the power, for instance, of using it for the purposes of his manufactory; nor do I see how there could be any such owner for the time being as the Act refers to. I think, therefore, that the plaintiff's case fails as to this point also, and that the motion must be refused, but certainly without costs.

Nov. 21st. The plaintiff now renewed his motion, by way of appeal, before the Lords Justices.

LORD CRANWORTH, L. J.—This is a motion, which seeks to restrain the defendants, the Company, from entering upon or taking possession of the piece or parcel of land and hereditaments required by them in the notice of the 25th of June, 1851, and proceeding to make their Railway through that piece of land. What they are proceeding to take is, as the plaintiff alleges, a piece of land constituting parcel of

his manufactory. Whether it does, in point of fact, constitute part of his manufactory or not, is a matter not for us but for a jury to decide; and it is sufficient to say, that at all events we are not at all satisfied that it is not part of the manufactory.

What the plaintiff says is this, that, being part of the manufactory, you have no right to take that part without taking the whole, because that is the express provision of the 92nd sect. of the Lands Clauses Consolidation Act.

There is no doubt that that is the precise enactment. [His Lordship then read the 92nd sect. (a).]

The plaintiff says he undertakes to prove that the piece of land which the Company are about to take, is part of his manufactory, and that he is ready, and willing, and able to convey the whole thereof; and he objects to their taking a part. If the matter rested there, it would be perfectly obvious, that the Company would have no right to take the part. It is admitted for this purpose, that they did give proper notice, and gave a bond under the 85th sect., so that they would have a right to enter but for this 92nd sect.


Then the Company say, that, although it is true that the 92nd sect. would have prevented them from taking a part of the plaintiff's manufactory without taking the whole, he being able and willing to convey, yet, assuming that to be so, that section is inapplicable to the present case, because it is inconsistent with certain other clauses in the special Act. That by the 2nd sect. of the special Act it is enacted, "that the provisions of the said Lands Clauses Consolidation Act, and of the said Railways Clauses Consolidation Act, shall respectively, so far as the same are applicable and are not inconsistent with the provisions hereinafter mentioned, be incorporated with and form part of this Act."

Now, the plaintiff contends that the clauses in the special Act do make this 92nd sect. inapplicable and incon-

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sistent with the provisions of that Act, and, undoubtedly, if that were so, then the 92nd section would not apply. But, what are the clauses which are said to be inconsistent with the 92nd sect. and so to exclude it? Section 12 was referred to; but we do not think that it has anything to do with it, or that it at all applies. The 13th and 14th sects. do apply in terms to the manufactory, because they apply *inter alia* to No. 161 as marked on the plan; and No. 161 is admitted to be the whole of the manufactory. Now that enactment is to this effect—that such part of the Railway by this Act authorised to be made as shall pass through any of the several plots, including 161 and a part of 158, shall be arched or covered over, and the top or upper surface of the ground shall be made strong in a particular way, so as to enable the passing of a railroad or other road over this archway that is so to be made over the Railway in question. And the argument is this—there are other arguments arising out of that enactment—but the main argument is this, that that is inconsistent with the notion that the Company must take the whole; for it is said, *cui bono*? if they take the whole, what was the use of the provision that there should be an arching over a part in order to make the communication over the Railway; when the whole became their own property they might deal with it as they thought fit.

Now there are several answers to that, as it appears to me—I do not say that this may be in the result the legal construction, but I confess the balance in my mind is strongly in favour of its being the true legal construction—although the 92nd sect. says, that the parties are to take the whole if the owners are able and willing to convey it. Peradventure the owners of 161, or of other manufactories, will not be able and willing to give them up, or they may wish to retain what is not taken, although damaged to a certain extent by the passage of the Railway. Then the legislature says—meeting such a case as this, which

ly arise with respect to any of these several half-a-dozen manufactories which will be interfered with if the Railway is made: If you make your Railway running through these manufactories, you shall arch it over so that the parties retaining the manufactory shall have the use of the passage to and fro over the Railway as they had before. The sections may also apply to the case of the owner not being able and willing to convey the residue. That that must be the meaning is plain from the consideration which presented itself, I think, to both our minds, just at the same moment of time on looking at that plan, namely, that the power to go through this manufactory, though to be exercised in the particular case only by cutting off at a particular angle, enables them in terms to run, if they think fit, through the centre, cutting off and breaking down the most material part of the building. Can it be supposed, that the legislature meant by an enactment of this nature, directing an arching for the purpose of having a railway running over the main Railway for the use of the manufactory, to deprive the party of such a material benefit as that which was conferred by the other enactment, namely, that they shall not be damnified by having the whole of their manufactory split in halves, and converted into a different sort of building, a totally different manufactory from that on which they had been expending their capital (a). It appears to me, that that is a strong argument, strongly preponderant, that these sections never meant to interfere with that prior enactment in the general Act, which is applicable to this and to all other cases of a manufactory; it meant to make special provisions for this special case of running through these manufactories; that, if they did run through, and did not take the whole,—which might well be if the parties were not willing to part with the whole,—then that they should do

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(a) It will be seen (infra, p. 32) that the two preceding sentences of the judgment do not apply to the present case, the Company being prevented by the limits of deviation from taking more than a very small corner of the building.

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that which was not incumbent on them by the general Act to do, or if it was incumbent, it is made more plain by the special Act, you shall make a particular sort of railway running over an archway capable of being used as a railway for the benefit and convenience of those whose manufactory you are taking in part, they not being able or willing to part with the whole.

That being my view, if I had to decide what the law was, I am free to say, that at the present moment I think the evidence which has been adduced is in favour of the view taken by the plaintiff in this case. I state, perhaps unnecessarily and therefore perhaps unwisely, that I do not mean to be bound by it when the matter shall come to be discussed more fully hereafter; but the question now to be decided is, whether there is such a case that the Court ought not to interfere in the meantime to restrain the defendants, the Railway Company, from taking possession of this manufactory, and so materially interfering with the rights of those who are using it as a manufactory, until they have established the proposition that they are by law entitled to take a part only of that of which, under the 92nd sect. of the general Act, they would be bound to take the whole. Upon that subject, I can only say that that is a matter for the discretion of the Court on the balance of convenience and inconvenience, and the degree of strength of the case that is made on the one side and the other.

Looking at it with that view, I cannot but say, that the preponderance is in favour of the plaintiff; it is all on that side; there is no pretence that any damage or injury will result to the defendants if they be restrained in the meantime from acting. They do not mean to say that they are either working, or that they have the slightest intention within any short space of time of working at this place, so that, in fact, the injunction will be merely a mode of putting the matter into a train of legal inquiry. I do not know whether my learned Brother is prepared to say what should be the exact mode; but whatever it

may be, it must raise the question of manufactory or no manufactory within the 92nd sect. of the Act.

There is one point which pressed on my mind, that possibly it may be that the owners of this manufactory are not, within the meaning of this 92nd section, able and willing to make a title, by reason of there being this right of way. How far that may interfere I do not exactly know, but that difficulty may be met by the sections which have been referred to, providing for the case of persons having rights of way. That will remain necessarily open. There are other questions on which I do not entertain any serious doubt, viz. the question raised in the case of *Brocklebank v. The Whitehaven Railway Company*(a), that will be open.

KNIGHT BRUCE, L. J.—And also the question of the recent erection of the buildings.

LORD CRANWORTH, L. J.—There is only one remaining question, whether, supposing the Company are wrong in their legal view, there are equitable grounds to prevent this Court from interfering to assist the plaintiff—such as the course of conduct pursued by the plaintiff on the passing of the Act. Now, if it were necessary to arrive at a satisfactory conclusion on this point, I confess I should require more time to look into the affidavits; but that point does not appear to me material. If that be the substantial equity, and the parties really think that any point can be made on that subject, it may be a sufficient reason for delaying the legal proceedings; but it cannot be a reason for preventing its coming into a course of legal inquiry, and it does not appear to me of sufficient weight to interfere with the order we ought to make.

(a) Ante, Vol. 5, p. 373; where the question was, whether the powers of entry and completing purchases exist after the expira-

tion of the period prescribed for the compulsory purchase or taking of lands.

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KNIGHT BRUCE, L. J.—I am of the same opinion. It must of course be considered in what way the legal questions can best be tried. Subject to this, whether the defendants had rather have the legal investigation postponed until the equitable question can be decided, which may render the legal inquiry unnecessary, we grant the injunction, without prejudice to any question.

Mr. *Bovill* then suggested to the Court, that, although the whole of the plaintiff's hereditaments were comprised in the parliamentary plans, and therein numbered 161, the limits of deviation only extended to a very small angle; and that the Company were restricted by the 15th section of the 8th Vict. c. 20 (The Railways Clauses Consolidation Act), from deviating or making their line beyond those limits.

KNIGHT BRUCE, L. J.—That is a point which has not been made before, and may open the whole matter, as the 92nd section of the Lands Clauses Consolidation Act may be found to be in collision with the section referred to. This also is a fit question for a Court of law.

Lord CRANWORTH, L. J.—Of course it will be understood, that so much of my observations in giving judgment, as depended on the supposed circumstances that the Company had the power of running their line through any part of the plaintiff's manufactory, is withdrawn.

Nov. 25th.

On this day, the Counsel for the defendants applied to the Court, that the consideration of the legal questions might be postponed to the hearing of the cause, as there might be equitable grounds, which would render the decision of the legal question unnecessary.

The Lords Justices suggested, that, as both parties were anxious to bring the matter speedily to a hearing, the plaintiff should dispense with an answer to the bill;

at the cause should be heard on affidavits as speed-possible (a).

On the 14th of February the matter was again argued before the Lords Justices upon the form of the injunction mode of proceeding at law, when they expressed opinion that there was considerable difficulty upon

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On the 15th of December, counsel on both sides agreed following order:—

Ordered, that the plaintiffs be at liberty to amend their bill, and may be advised; but the amendment is to be made on or before Monday, the 29th day of December instant. And the defendants, by consent, ordered, that this cause be treated as if an answer had been filed and replied to; and, like consent, all the affidavits already filed, and any further affidavits to be filed, by both or either of the parties within a month from the said 25th day of December instant, are to be read in evidence on the hearing; and an affidavit is to be used unless within that period: such further affidavits to relate only to matters raised upon the affidavits; and each party to file no further affidavits without the affidavits of the opposite party; And ordered, that the copies of the deposited plans and of the reference of the line authorised by the Oxford, Worcester and Wolverhampton Railway Company's Deviation Act, be made and verified for the hearing. And by the

like consent, this arrangement is to be without prejudice to the right of either party to appeal on the merits. And, by permission of the Court, the cause is to be heard before their Lordships after the 30th day of December instant. And in the meantime, it is ordered, that the defendants and their agents, servants, and workmen, be restrained by the order and injunction of this Court from entering up or taking possession of the pieces or parcels of land and hereditaments in the plaintiff's bill mentioned, so required by the said defendants in the notices of the 25th day of June, 1851, in the plaintiff's bill mentioned, or mentioned in the schedule to the defeazance of the bond in the said bill also mentioned, or any part thereof, and from committing any waste or spoil thereon, and from proceeding to take any measures to acquire the said pieces or parcels of land and hereditaments by compulsory purchase, unless the said defendants at the same time proceed to purchase the whole of the plaintiff's manufactory in the said bill mentioned, and to make compensation to the plaintiff for all damage to be sustained by him in consequence of the taking of the said manufactory.

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the merely legal questions, and, unless both parties should state to the Court that it was their wish that it should decide those legal questions without sending them to law, all the Court could do would be to protect the property in the mean time by injunction. But their Lordships expressed their readiness to adjudicate upon the legal questions permanently, if they were requested by both parties so to do. With regard to the equitable part of the case, they remarked, that if the plaintiffs, or either of them, could have been associated with the introduction of the 13th and 14th clauses into the special Act, so as to render it a breach of contract on their part to insist on their rights as they were then insisting, that would probably have formed a good ground for dismissing the bill; but their Lordships were of opinion that the case totally failed in that respect.

May 1st. The parties having at length determined to avail themselves of their Lordships' offer to hear and adjudicate on both the legal and equitable questions, the cause came on for hearing.

Sir W. P. Wood, Mr. Malins, Mr. Shapter, and Mr. Gray, contended, that the part of the plaintiff's property intended to be taken by the Company constituted a part of a manufactory; and the defendants could not take a part of it without taking the whole: *Stone v. The Commercial Railway Company* (a), *Barker v. The North Staffordshire Railway Company* (b), *Reg. v. The London and South Western Railway Company* (c), *Reg. v. The London and Greenwich Railway Company* (d). That they were now precluded altogether from taking any part of the plaintiff's lands, by the time having elapsed within which they had the power to take lands compulsorily: *Brocklebank v. The*

(a) Ante, Vol. 1, p. 375.

(b) Ante, Vol. 5, p. 400.

(c) 12 Q. B. 775.

(d) 2 G. & D. 444.

Whitehaven Railway Company (a). That the judgment of the Court below had been influenced by the effect which the 13th and 14th sections of the special Act had on the 2nd section of the general Act; but that the provisions of the general Act were not inconsistent with those of the special Act; for if the plaintiffs had consented to the Railway Company passing through their property, without requiring the whole of the manufactory to be taken, then the provisions of the special Act would have been brought into action. That, in fact, the provisions in question had been inserted by other persons having easements over the plaintiff's property, and not by the plaintiff himself.

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[*Knight Bruce*, L. J.—Suppose that we should be of opinion that the fact of the buildings having been erected after the passing of the Act, took it out of the 92nd section.]

In answer to this, it was contended, that, on the general question, it would be a serious hardship on the landowner that he should be precluded from improving his land during the whole time given by Parliament for completion of the Railway; whereas, the Railway Company could not be damnified, for they might, immediately after the passing of their Act, give notice of their intention to take the land, which would at once settle the question of property between them and the landowner. That, if the company did not give the notice, the landowner must treat his property as he pleased, and the Company must bear the consequences of their own delay; but that, in the special case, the erection of the buildings did not affect the question, for it had been proved by the affidavits that the ground was inclosed by a wall, and was necessary for the purposes of the manufactory; and that the 92nd section of the general Act was, in fact, incorpor-

(a) Ante, Vol. 5, p. 373.

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ated with the special Act, and would come into effect at the will of the landowner, as soon as any notice was given by the Company to take his land.

Mr. *Bethell*, Mr. *Rolt*, Mr. *Bovill*, and Mr. *Willes*, contended, that, if the 92nd section were incorporated with the special Act, then the 13th and 14th sections, providing for the partial occupation of the property, would be unnecessary, as the Company would be obliged to take the whole. That it was clear that the plaintiff never supposed until the new buildings had been erected, that the strip of his property comprised in the deposited plan was part of a manufactory. That the limit of deviation precluded the Company from making their Railway so as to use the entirety of the plaintiff's property, if they were compelled to take it. That the plaintiff had altered the state of things since the passing of the Act, so as to render that a part of a manufactory, which could not have been so considered at the time the Act passed. That the Company could not be compelled to take any property not described in the parliamentary plans; and that their powers were limited to the then existing state of things. That the 92nd section of the General Act was only an extension of those powers, but subject to the same limitations. That, if a manufactory existed at the time of the passing of the Act, and had been described in the plans, the Company might be compellable to take the whole if they required a part; but it never contemplated that an individual might convert a piece of ground into a manufactory, and so prevent a Company from taking the land at all. That every external thing referred to by the General Act must mean a thing then existing.

[Lord *Cranworth*, L. J.—The converse of the proposition would hardly be true, that, if a manufactory existed at the time of the passing of the Act, and the owner pulled

it down, the Company must pay as for a manufactory, when they only get land.]

That the Company did not in the present case intend to displace a brick of the manufactory; that they intended to pass through the plaintiff's land by means of a tunnel, which would render it no longer a taking within the meaning of the 92nd section, but land injuriously affected under the 63rd section. That the present was a case of compensation, and not of purchase. That the Company had, within the time limited by the Act for the compulsory purchase of land, given notice of their intention to take; and that if it should be held that the piece of land in respect of which they had so given notice was not part of the manufactory, they could not now be prevented from completing the contract which they had commenced: *Doe d. Armistead v. The North Staffordshire Railway Company* (a), *Worsley v. The South Devon Railway Company* (b).

The counsel for the plaintiff were not called on to reply.

LORD CRANWORTH, L. J.—[After stating the facts and proceedings in the cause:] There appear to me two main questions for consideration—one a question of fact, and the other a question of law. The question of fact was this, whether that which the plaintiffs proposed to take did, within the true meaning of the Act, constitute a part of the manufactory; and, secondly, the question of law was, supposing it to constitute a part of the manufactory, were they enabled to take it without taking the whole. Now, upon the question of fact, that again divides itself into two questions—one, which is, perhaps, rather a ques-

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(a) 20 L. J., Q. B., 453.

tion Railway Company, Ante,

(b) Id. 254. See *Reg. v. The*

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tion of law than of fact, arises out of the consideration of that which is mere fact. What they proposed to take was a certain piece of land, inclosed within the wall that surrounded that which was called the manufactory, but which, at the time when the Act passed, was not covered with buildings. The plaintiffs, having made their purchase just before the Act of Parliament had passed, after the passing of the Act, and, as I collect, soon after, erected considerable additional buildings on that piece of land, the whole or greater portion of which was vacant at the time when the Act passed. There can be no possible doubt but that those additional buildings constitute part of the manufactory in the strictest sense; but then it was contended, that what was to be looked at was not the state of the property at the time when the Company proceeded to take the land, but at the time when the Act passed; and it was said, that, at that time, these buildings did not exist, but that it was vacant ground—within the wall, it is true, of the manufactory,—not having any manufacturing process carried on upon it, and that it did not therefore constitute part of the manufactory within the meaning of the Act.

Now, we do not feel it necessary to decide the question as a matter of law, what is to be regarded as the state of the property at the time when the Act passed, or at the time when the land was taken by the Company. We do not consider it at all necessary, in this case, to look at or discuss that question, because we are both most clearly of opinion, without the least difficulty or hesitation, that this was, to all intents and purposes, a part of the manufactory at the time when the Act of Parliament received the Royal assent; and we think so, as a jury, coming to the conclusion as to what did or did not constitute part of the manufactory. In all these questions there may be nice points, so that it may be difficult to say on which side of the line a particular piece of land, or the particu-

building, lies; whether it is outside, so as not to be of the manufactory, or inside, so as to be considered an integral part of it. But we do not feel ourselves driven into any refined discussion in the present case; and, looking at the model, which is taken to be an accurate representation, it appears (I speak this only for the present) that there is singularly little vacant space within the wall; and I can very easily believe what one or two of the witnesses said, that they were always pressed for space, in order to have some place where they might deposit the rubbish and the scoria which come from the furnace.

A manufactory cannot go on without that, any more than it can go on without the furnace itself.

It seems to me, and I am sure also to my learned Brother, that it is perfectly clear, that in this case everything included within that wall constituted part of the manufactory. The outer wall of the building is the wall of the manufactory; sometimes there is a little vacant space between the building and the wall, but it is all within the wall, which evidently incloses and surrounds that which popularly and legally constituted part of the manufactory: therefore, it seems to me to be perfectly immaterial to consider whether there were or not buildings on that vacant space at the time the Act received the Royal Assent.

Will the Company then give notice that they will take a piece of land that constitutes part of a manufactory: are they or are they not bound to take the whole of it? Now, that depends on a question of law, whether or not the 92nd section, which I have already referred to, was or was not expressly or impliedly incorporated into the private Act. We have referred to the language of the Lands Clauses Consolidation Act itself, to shew (as if that was the test) whether it was incorporated or not. It may be one mode of ascertaining it, but it is not the best mode; the best mode is to look at the special Act to see what that Act has said; and that Act says, "That all the provisions of the Lands

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Clauses Consolidation Act shall, so far as the same are applicable, and are not inconsistent with the provisions thereafter contained, be incorporated with and form part of this Act." Now, it was not disputed that the provisions of the 92nd section as to a manufactory, are applicable in the sense in which that word is there used; but what was contended was, that the 92nd section was inconsistent with the provisions thereafter contained; and it is on that point that we have the greatest difficulty—I will not say difficulty, but the greatest pressure on our minds, because it certainly appears to have been the opinion of a Judge of the highest eminence, and for whom we both, in common with all the profession, feel the most profound respect—it appears to have been his opinion that it was not incorporated in the Act; therefore, we have felt diffident of the opinion which we formed, and the reason is, because it certainly appeared to us pretty clear that it should be decided in a contrary way from that in which the Vice-Chancellor *Turner* has decided it; we thought it pretty clear from the beginning, that there was nothing in any of the subsequent provisions inconsistent with the notion of this section being incorporated in that Act; and I proceed therefore shortly to see what are the grounds on which it was contended here, and before Vice-Chancellor *Turner*, that the 92nd section was not incorporated, because it was inconsistent with the Act.

Now I think the argument here proceeded always on a fallacy. It was assumed that the 92nd section was imperative; that the enactment was, that the Company must take the whole of a manufactory, whereas it only says, that they may take it if the other party requires it to be taken; but it would have been the height of injustice to enact, that in all cases they must take it *in invitum*. The owner of a manufactory might say, in many cases, it is quite immaterial whether you take the whole or not, it is immaterial

me whether you take this part or the whole. In that case they are not bound to take the rest. It seems to me, that the whole of the argument on the part of the defendants has proceeded on that fallacy; for, when one looks at the different arguments which have been deduced from the 12th, 13th, and 14th sections, I consider that the 92nd section does not enact, that, under all circumstances, the whole must be taken; but only that, if the Company wished to take any part, they must, if the owner require it, take the rest of the manufactory: and then all the difficulty vanishes.

The 13th section, which is that mainly relied upon, has enactments to this effect. It appears that a Mr. Crane was the owner of some land adjoining to this manufactory, and by arrangement between the plaintiff, the owner, and Mr. Crane, and for their common convenience, it was arranged that there should be a siding, as it is called, in other words, a little private railway, that was to run up for the accommodation of both those works, the works of the plaintiff and of Mr. Crane, and to run on for a considerable way down to the west, so as to join, not this Railway, but the Stour Valley Railway; that evidently was with a view to the accommodation of the parties interested in that siding or private railway. The 13th section enacted, that such part of the railway of these defendants as should pass through any of the pieces of land numbered 159, 160, 161, 162, and part of 158, specified in the plan, that is, those pieces of land on which this siding or private railway was to be formed, should be arched over, or covered over in a particular manner, so as to be able to sustain the weight of a private railway running up to and communicating with the Stour Valley Railway.

Now, the argument was, that that provision was inconsistent with the notion that the Company should take the whole of this manufactory: for, if so, it was

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said, for what purpose make an enactment about making a railway which would in truth be their own railway; they might deal with it as they thought fit. But there are two answers to that: first, the answer which I have already hinted at, namely, the non constat that the Railway Company will be called on to take the whole manufactory; it may be, that the plaintiff may choose to retain his own manufactory, and then that secures to him this benefit. But then there is another argument which completely satisfies this clause, which is this: that this siding railway was not for the exclusive benefit of the plaintiff; certainly one other proprietor, Mr. Crane, was interested. There is no doubt that the party who was mainly interested in it was Mr. Crane; therefore the provision of the 13th section was necessary to secure to him and any other persons interested in it, their rights with respect to that private railway, in case the plaintiff did call on the defendants under the 92nd section to take the whole of his manufactory. Therefore it seems to me, that there is nothing whatever inconsistent with the 13th section in supposing that the 92nd section was to have its full operation.

Then, as to the 14th section, it is said, that it is impossible that the 92nd can be considered as incorporated; for this reason, that, when this Railway was made there was a provision in the 14th section that no building should be erected on that new siding railway, which included a part of that which is now to be taken from the plaintiff, without the consent in writing of the Company; therefore the Company were interested in seeing that nothing should be done to damage them. For what purpose, it is said, do they stipulate for that, if they themselves are to become the proprietors of the manufactory, of which the private railway is intended to be an adjunct. Just the same answer applies to this, if the Company become the proprietors, this stipulation becomes superfluous; of course they would not give a consent in

writing to themselves, they may do what they think fit with their own property; but it may be, that they will not become the proprietors, then such a stipulation is necessary.

Then again, our attention has been directed to the 12th section, which is said to be inconsistent with the notion that the 92nd section was part of the Act, for that section provides, that the Company shall be required to purchase certain properties, (as they are called), numbered respectively 90, 91, 130, 131, and 140, being within the limits of deviation, and, I will assume for the present, being all of them manufactories, (or houses or manufactories, or something that would come within the same class as that which is referred to in the 92nd section). Then it is said, for what purpose enact that those particular manufactories shall be taken, when the 92nd section would have effected all the purposes; that is a complete fallacy. The 92nd section only gives authority to the owner of the manufactory to insist on the whole of it being taken, if any part is taken; but this enactment as to these properties numbered 90, 91, 130, 131, and 140, positively stipulates, that they shall take the whole of them.

It is obvious, in looking at the plan, that a large portion of those properties must have been taken in some measure to stop the opposition of the owners; because the Company cannot use them all for the purpose of the Railway, as they are all a long way out of the line contemplated, though within the line of deviation; and I therefore conclude that the enactment was introduced to buy off opposition: it is sufficient for the purpose of the present object to say, that it is a different enactment from the 92nd section. The 92nd section does not say, you shall take every manufactory that is within your line of deviation, but it says, if you take a part of a manufactory, you shall, if the owner wishes, be required to take the whole. What is enacted in the 12th section

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is different, namely, that with regard to several manufactories within the line of deviation, but not probably in the line that will be touched by the Railway, you shall take and pay for those, whether you use them or not. It appears to me that that also wholly fails as a reason for inducing us to suppose that the 92nd section is inconsistent with the provisions of this Act.

It has been pressed upon us that these clauses were introduced in consequence of some application that was made by the plaintiff to the Houses of the Legislature when the bill was there pending. In the first place, the fact, I think, wholly fails, as far as the plaintiff was concerned. It is true that he petitioned the House of Commons—so it was said, and not controverted—against this bill passing, because he thought it would damage his works. I must say that there appears to me to have been every thing like *bona fides* on the part of the plaintiff, because he was laying out very large sums of money in extending and improving his manufactory; he thought that it would materially damage him, and petitioned against the passing of the bill; he did not, it is said, appear by counsel; Mr. Crane did; but very likely he was in communication with Mr. Crane. Mr. Crane did appear by counsel, and Mr. Crane, I dare say, first procured this enactment to be introduced in regard to the private railway; that was a benefit to the plaintiff; but it is quite clear that he did not think it went far enough, or that the Act secured him in the way he wanted to be secured, for he did petition the House of Lords, that, notwithstanding the introduction of that clause, the bill ought never to pass into an Act. It was said, indeed, that the plaintiff had stopped himself from this argument on the 92nd section, by representing, that the effect of it would be, that he could not insist on the 92nd section. I think that that was but lamely made out; but, if he did, we cannot be bound by his view of the law; and it is very strongly in his favour on the question of fact, that he

ever meant to consent; but what he meant to do was, to insist on the whole being taken, if any part was taken. It seems to me, that, as far as it has any bearing, it is in favour of the plaintiff, and not against him; it shews that he had his attention alive to the subject, that he had the 92nd section in his contemplation, and that he meant to insist on it if he could. That being the state of the case, the conclusion at which we have arrived is, that, in point of fact, the property that the Railway Company has given notice to take, was, at the time they gave the notice, part of the manufactory; and that the 92nd section entitles the owners of the remaining part of the manufactory to insist on the whole being taken.

The only remaining question is, that which I believe has been raised now for the first time, it came upon me entirely by surprise, that, although they had given notice in the ordinary way, that they meant to take the land, that entitles them, either by virtue of that or independently of it, if they cannot take the land, to burrow under it as it were, or to make a tunnel through it, which they say they are able and willing to do, without taking or touching any part of the surface. A great number of arguments were urged upon us in this way. It was said, suppose the manufactory was on the top of a hill, and the Company were to burrow under it at the distance of a thousand feet, are they then taking part of the manufactory? I do not feel myself called upon to decide that question; but, if I were, I rather believe that they are, on the principle *cujus est solum ejus est usque ad cælum et ad inferos*. Do you mean to say, that, if you were one inch below the surface, you would not be taking part of the manufactory, you might come in contact with the foundation; so if you undermine any portion of it, it might all fall down: I am therefore inclined to think, that, however deep you may pass below, it would be within that enactment.

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If that has been a *casus omissus*, I think it ought to be construed in a way most favourable to those who are seeking to defend their property from invasion. I do not, however, think that arises, because the notice here is to take the land, and upon that notice they are proceeding in the ordinary way to take it; that is evidently what was contemplated when the notice was given; and it is perfectly obvious, from the language of the bond they gave, that that is what they mean to do, because they have given a bond under the 85th section, entitling them to enter, and in that bond they have stated thus, that the value has been assessed for the purchase in fee simple of the several tenements, buildings, hereditaments, &c., and the 350*l.* has been assessed as the value for severance. It is perfectly obvious, that what is meant is, that they are to take that line, and pay 150*l.* for the value of the building, and the 350*l.* for the inconvenience occasioned by the severance. That is the way in which they put it themselves, and I cannot but come to the conclusion, that this is a mere after-thought. I do not think that they would have the liberty of doing it, unless they had given a proper notice for the purpose; but it is quite obvious, that either they are entitled under this notice to take the land, or to do nothing. I think, therefore, that the plaintiffs are entitled to the relief they ask. The injunction will, therefore, be made perpetual in the terms in which it was made before, except with this suggestion, or some other addition to the like effect: "the plaintiffs being ready and willing, and undertaking, to make a good title to the same, and to convey the same."

Sir *W. P. Wood* suggested, that the only difficulty would be as to Crane's easement.

Lord CRANWORTH, L. J., said, that that did not appear to

a difficulty, as the manufactory did not cease to be one, cause another person had a right of way over it.

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KNIGHT BRUCE, L. J.—I have but a very few words to say, or what my learned Brother has said. Being very clearly of opinion that the plaintiff is entitled to a decree, perhaps a few words that I am about to say are superfluous. I continue to entertain an opinion differing from a judgment which I hold in the highest respect and estimation on the question of the effect of the 12th, 13th and 14th sections. I am of opinion, for the mere reason that it is competent to the plaintiff, if he should think fit, to take part and not the whole, that those three sections do not prevent the application or incorporation of the said section into the particular Act. I am, moreover, clearly of opinion, upon the undisputed facts of the case, that whether the state of the property at the time when the decree of June last was given, or at the time of passing the special Act is regarded for the purpose, that the land which the Company require is part of the plaintiff's manufactory, within the meaning of the 92nd section, incorporated, as I have said that I think it is, in the special Act. Observations were made upon the petition to the House of Commons and the petition to the House of Lords. I am on the allegations in those two petitions. Those allegations may or may not have been accurate. Fraud or unfair intention as to either of these petitions is entirely out of the case; it is not pretended that they, or either of them, amounted to it. They might, by possibility, however, have been so worded, however unfairly, as to amount to a misrepresentation of fact or intention, from which, if they had induced a particular line of conduct on the part of those to whom they were made, it might not have been allowable to the plaintiff to depart. I am of opinion, however, that the case is not brought so high, and that there is no evidence, that, by reason of the representations

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contained in either petition, the Company were induced to adopt any line of conduct to their prejudice, which otherwise would not have been adopted.

Then, with regard to design, it is now said to be practicable, and that the Company intend, to carry the Railway under the surface of the land in question, in such a manner as not to disturb or to interfere with it. One sufficient answer to that has been stated, which, independently of others that might perhaps be given, is this, that the notice of June was a notice to purchase merely and absolutely the fee-simple of the land specified in it. That notice, whether amounting to a contract or a declaration of intention, and whether or not forbidden by law to be receded from, is of no importance; it had the effect of a contract, and, moreover, the effect of giving the plaintiff the right to say that his land—I mean the land mentioned in the contract—should not be taken or used, unless, if he desired to sell the whole of the manufactory, the defendants should purchase it. From that position the defendants, however desirous they may be, are, in my opinion, not entitled to recede. Substantially, therefore, I agree entirely with my learned Brother, that the decree must be with the plaintiff. The defendants must pay the costs of the suit, including the costs of the original motion for injunction.

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Jan. 25th.

Re WALKER, a Lunatic, Ex parte THE MANCHESTER AND
LEEDS RAILWAY COMPANY.

THIS was a petition presented to the Court for the purpose of confirming the Master's report approving of a contract entered into on behalf of a lunatic by his committees, for the sale of a portion of his estate to the above-mentioned Railway Company.

The petition, in addition to the usual order, prayed that the costs of the heir-at-law of the lunatic before the Master, and on the petition, might be taxed and paid by the Railway Company.

Mr. *Bacon*, for the Company, objected that such costs were not provided for by the 80th section of the Lands Clauses Consolidation Act, and that the Company were therefore not liable to pay them.

Mr. *Walpole*, for the committees, cited *Re Taylor (a)*.

Mr. *Murray* for the heir-at-law.

The LORD CHANCELLOR.—The intention of the legislature was, that a lunatic's estate was not to be subject to costs in consequence of a Railway Company having taken part of it. Whether the estate is burthened with costs, directly or indirectly, is of small consequence. The principle of the Act is, that it shall not be burthened at all; and it directs that "the costs of the purchase or taking of the lands, or which shall have been incurred in consequence thereof," shall be borne by the Company. According to the practice, the attendance of the heir-at-law before the Master was necessary. It would be a great injustice to the lunatic's estate if it were to be saddled with the costs of that which is to be done for the benefit of a public Company.

The Company must pay the costs of the heir-at-law.

(a) Ante, Vol. 6, p. 741.

Where the committee of a lunatic's estate contracts, under the power of the Lands Clauses Consolidation Act, with a Railway Company, for the sale of a piece of the lunatic's land, the costs of the attendance of the heir-at-law before the Master and on the petitions come within the 80th section of that Act, and must be borne by the Company.

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Hilary Term, 1852.

May 31st,
June 5th.
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Feb. 10th.

THE QUEEN, on the Prosecution of THE OVERSEERS OF TILE-
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The Great
Western Rail-
way Company
were assessed
to a poor-rate
in respect of

ON appeals by the above Company, against certain rates made for the relief of the poor of Tilehurst and other parishes, coming on to be tried at the April Quarter Sessions,

their occupation of two and a half miles of railway in the respondent parish, which two and a half miles were part of a line of twenty-five miles, constituting what was originally intended as an entire line (The Berks and Hants Railway), but which was constructed at the cost of and is now owned and worked by the Great Western Railway Company, being by Act of Parliament incorporated therewith. A certain number of engines and carriages are appropriated to it, and a certain number of officers and servants are employed exclusively on that branch. No separate accounts of receipts and expenditure of this branch are kept, but they are included in the general half yearly revenue accounts. It could be worked as a separate railway, but this would require a larger moveable stock and a greater expenditure than the Company now actually employ on it. The actual expenses of the Company are not in the proportion with the actual gross receipts, either on the branch or throughout the entire line, nor are either of such gross receipts or expenses at one uniform rate per mile throughout the entire Railway. In order to give the net rateable value of the whole line, the Company, in addition to allowances for annual repairs of rails and framework and of moveable stock, claimed to be allowed for ultimate renewal and reproduction. They did not annually set aside any sum to form a distinct fund for this reproduction, but they retained out of their annual revenue a reserve fund for all contingencies, including these items:—*Held*, that they were entitled to such allowance.

To ascertain the net rateable value of the two and a half miles, the deductions from the total gross revenue are to be apportioned on the parochial principle. The expenses incurred in earning the gross receipts on the two and a half miles are to be ascertained, and then the charges, parochial or otherwise, that they are liable to; and the same process is to be gone through with regard to the two and a half miles, as would be if the whole line were in one parish. But this principle does not preclude a consideration of charges wherever arising locally, which are necessary for keeping the subject of assessment at the value which is made the measure of that assessment; and wherever such charges apply equally to every mile of a Railway, the mileage principle may be adopted.

The Company, in order to ascertain the net rateable value of the two and a half miles, separated the branch from the trunk line, except as to a small portion of the general expense of the entire Railway, and then divided the expenses of the branch on the mileage principle:—*Held*, that though the Company were not necessarily wrong in this last particular, on the facts of this case they could not so separate the trunk from the branch, the one being absorbed in the other.

The respondents, in order to determine the rateable value of the two and a-half miles, ascertained the rateable value of the whole Railway minus the stations; they ascertained the gross actual annual receipts of the Company in respect of each mile in their parish, and they assessed the Company in respect of the two and a half miles in the ratio which such annual receipts bore to the gross annual receipts of the Company in respect of the entire of the Great Western Railway trunk and branches, the rateable value of a mile of Railway in the respondent parish being calculated in the same proportion to the rateable value of the whole line, exclusive of stations, as the gross actual annual receipts in respect of such mile bore to the total of such actual annual receipts of the Company:—*Held*, that the actual expenses of the Company not being in the proportion of the actual gross receipts, either on the branch or throughout the entire line, and such gross receipts and expenses not being at one uniform rate per mile throughout the entire line, this mode of assessment was wrong.

(*a*) Before Lord Campbell, C. J., Patteson, J., Coleridge, J., and Erle, J.

850, for Berkshire, the Court of Quarter Sessions confirmed the rates on the following terms:—That the appeals be referred to two barristers (with power to refer any matter in difference between them to a third party named by them), who were to decide at what amount the several rates should stand; and that the arbitrators, if they should deem it necessary or expedient, should make a separate award in the nature of a special case on one or more of the said appeals, in such terms and ways as would enable either of the parties to take the opinion of the Court of Queen's Bench; and that they might defer their award on the residue of such appeals, so as to enable them to make their final award in conformity with the opinion of the Court; and that they might amend the rates accordingly.

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The arbitrators made their award in the above appeal so as to take the opinion of this Court on the following case:—

The Great Western Railway Company were assessed to the relief of the poor of Tilehurst by a rate made on the 10th of April, 1849, in respect of land covered by a portion of the line of the said Railway, being part of a branch of the said Railway from Reading to Hungerford, called the Berks and Hants Railway. The grounds of appeal were, that the appellants were assessed at an amount exceeding the just rateable value of the said Railway. The said branch of the said Railway is twenty-five miles and a quarter in length. It was originally constructed under 8 & 9 Vict. c. xl. by the name of the Berks and Hants Railway. The 18th section of that Act enabled the Great Western Railway Company to purchase and the other Company to sell the undertaking; and directed, that, on the completion of such purchase, the Great Western Railway Company should have and hold the said undertaking, and that the Company thereby incorporated should be dissolved, and the buildings and works thenceforth become part of the Great Western Railway. By virtue of this provision the Great

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Western Railway Company purchased the Berks and Hants Railway, which, by 9 & 10 Vict. c. xiv., thenceforth became part of the Great Western Railway.

The Berks and Hants Railway was constructed at the cost of the appellants; and, on its completion in 1848, was opened for traffic as a branch of the Great Western Railway, and has been ever since, and at the time of making the rate in question was and still is, worked by the appellants as part of the entire Great Western Railway; but a certain number of engines and carriages are appropriated to it, and a certain number of officers and servants are employed exclusively on that branch. No separate account of receipts and expenditure in respect of the branch is kept by the appellants, but such receipts and expenditure are included in the general half-yearly revenue accounts laid before the proprietors; and no separate annual account in abstract, shewing the total receipts and expenditure in respect of the branch is prepared by the appellants, so as to be furnished to the overseers of the poor of the several parishes through which the said branch passes, in conformity with the 8 & 9 Vict. c. 20. The branch line could be worked (as originally intended to be) as a separate Railway under independent management, but this would require a larger moveable stock and a greater expenditure than the Company now actually employ or bestow on it. The actual expenses of the Company are not in the proportion with the actual gross receipts, either on the branch or throughout the entire Railway; nor are either such gross receipts or such expenses at one uniform rate per mile throughout the entire Railway. The profits of the Company are wholly derived from the carriage of passengers and goods, and none but the Company's engines and carriages run on the line.

The respondents computed the rateable value of such portion of the Railway as follows:—They estimated the rent at which the entire Great Western Railway, trunk and branches, with its appurtenances, including stations,

night reasonably be expected to let, from year to year, free of all usual tenants' rates and taxes, and tithe commutation rent-charge, and deducting therefrom the probable average annual cost of repairs, insurances, and other expenses necessary to maintain the Railway in a state to command such rent; which rent, for the purpose of the present award, is to be taken to be such portion of the net annual profits of the Company, after making all proper deductions in respect of tenants' profits, including the profits of trade, as a tenant from year to year might be reasonably expected to give for the right to occupy such Railway as a carrier. The mode in which such estimated rental was calculated is as follows:—The respondents ascertained the actual annual receipts of the Company, occupying as carriers the entire Great Western Railway, trunk and branches, from the carriage of passengers and goods over the said Railway, between the 1st of January, 1849, and the 31st of December in the same year. From this they deducted the actual annual expenditure of the Company during the same period, under the following heads:—

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1. Maintenance of way, stations, and works.
2. Locomotive account: including enginemen and firemen, waste, oil, tallow, and firewood, labourers and cleaners; cost of superintendence, including clerks, firemen, and office charges; repairs of engines and tenders, comprising wages, materials, &c.; coke and coal consumed by locomotive engines; rates, taxes, lighting, and gas; repairs of buildings; turn-tables, &c.
3. Carrying account: comprising the expense of guards, police, and inspectors; porters; clothing; carriage and waggon repairs; stores consumed; stores, disbursements, lighting and gas at stations.
4. General charges: including superintendence and clerks; stationery accounts; disbursements and tickets; sundry office expenses; advertising, postage, &c.; travelling expenses, &c.; loss on light gold; law charges; medical expenses.
5. Disbursements for repairs and alterations of stations, and insurance.
6. Compensation for accidents, returns, and allowances.
7. Government duty on gross receipts from passengers.
8. Rates and taxes.
9. General offices for direction, salaries, and office expenses.
10. Law stationer's account for copying.

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The above deductions comprise the actual annual trade expenditure of the Company, and also their actual annual expenditure, from the 1st of January, 1849, to the 31st of December following, necessary to maintain the Railway and its appurtenances in complete repair, and the moveable stock of the Company, including engines, tenders, and carriages of all descriptions, in effective working order and condition. The difference between the actual annual receipts of the Company and such deductions the respondents considered to be the net annual profits of the Company, as such occupiers of the entire Railway. They then assumed an amount of capital invested in the entire moveable stock employed in the trade, which for the purposes of the present rate, is to be taken to be correct, and deducted from such net annual value a percentage on such capital in respect of interest and tenants profits (including the profits of trade) which, for the purpose of this rate, is to be taken as the proper percentage in that behalf. The residue they considered to represent the net annual value of the entire Great Western Railway, trunk and branches, with its appurtenances, including the stations, within the meaning of the Parochial Assessment Act. They further deducted the annual value of the stations, which are rated apart from the line of Railway. Having thus ascertained the rateable value of the whole Railway minus the stations, they ascertained the gross actual annual receipts of the Company in respect of each mile and portion of a mile of Railway in their parish, and they assessed the appellants in respect of the said two miles and a half of Railway in their parish, in the ratio which such annual receipts bore to the gross actual annual receipts of the Company in respect of the entire Great Western Railway, trunk and branches, the rateable value of a mile of Railway in the respondent parish being calculated in the same proportion to the rateable value of the whole line of Railway, exclusive of the stations, as

the gross actual annual receipts in respect of such mile more to the total of such actual annual receipts of the Company.

The appellants contended, that, assuming the rateable value of the whole Railway to be the right basis of the rate in each parish, and that such rateable value had been correctly ascertained by the respondents, it ought to be distributed along the line, and apportioned on each part of it, in the ratio of the net earnings or net profits accruing to the appellants in respect of that part, and not in the ratio of the gross receipts. And for the purpose of supplying to the Court of Quarter Sessions the means of amending the rate, they estimated the rateable value in the following manner:—They took the gross receipts per mile per annum in the respondent parish exactly as the respondents had done, and they deducted from these the actual expenses of each mile ascertained or estimated. In order to do this, they ascertained the actual expenses incurred on the branch alone; and where those expenses were common to the entire branch, they divided such expenses by the number of miles in the branch; and they considered the result to be the expense of each mile in the branch. A small portion of the general expenses of the entire Railway, being those of central superintendence, printing, and advertising, were apportioned on the branch in the ratio of the business or traffic upon it, and such portion was then subdivided, as before, on the mileage principle. The following are the expenses and deductions, estimated as above, and claimed by the appellants:

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1. Maintenance of way, including actual annual repairs of way, rails, fences, &c., at per mile.
2. Salaries of servants, police, &c., on the branch, per mile.
3. Lighting and office expenses on the branch, and share (apportioned as above) of general expenses of central superintendence, printing, and advertising, per mile.
4. Annual repair of carriages used on the branch, per mile.
5. Actual cost of running engines on the branch, per mile.

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6. Rates and taxes, per mile.
7. Government duty.
8. Annual rateable value of the stations, on the branch only, ~~amount~~ per mile.
9. Estimated sum per mile per annum for renewal and reproduction of rails and framework of the branch Railway, over and above the actual cost of maintenance of way, and annual repairs specified above (No. 1).
10. Estimated sum per mile for renewal and reproduction of moveable stock employed on the said branch, over and above the annual repairs specified above.

Articles 9 and 10 are not annual expenses actually incurred and paid, but the estimated annual sum considered sufficient to form a fund for the complete renewal and reproduction, when needful, of the rails and timber framework, and also of the engines and carriages, called in the above list of deductions "moveable stock." The appellants do not now specifically appropriate any part of their revenue to form a distinct fund for either of these purposes, but they retain out of it enough to form a reserve fund for all contingencies of whatever kind. Since the opening of the Railway a large sum was applied to the renewal of a part of the Railway which had been worn out, and the expense was paid out of capital and not of revenue. It wore out in a few years, because lighter materials had been used than have since been employed throughout the Railway. Since that time all needful repairs and renewals of the rails, timber, and framework, have been defrayed year by year as they occurred from the revenue. With respect to the moveable stock, a large fund was originally appropriated to its renewal; but such fund has been since considered unnecessary, and the expenses of reparation and renewal have been paid out of the annual revenue; and this has hitherto been found sufficient to keep it in an efficient state, but not to maintain it in a state to sell for its cost price, if valued. The appellants claimed, further, to deduct an annual sum for interest on capital and tenants' profits (including those of

ade), being a per-centage on the capital actually and necessarily invested by the Company in the moveable stock employed on the branch Railway: this also they proposed to distribute, like other deductions, by a mileage apportion over the branch. Assuming the above deductions to be properly allowable in point of law, they greatly exceed the receipts; and the branch Railway is not in itself profitable, nor would the occupation of it alone by any tenant be a beneficial one; and the same would be the result, even if articles 9 and 10 be disallowed and omitted; but it is profitable to the Company, as proprietors of the entire Great Western Railway, by reason of the increased traffic brought upon the main line, and the increased receipts upon that line between London and the eastern termini of it.

If the Court shall be of opinion that the principle on which the assessment has been made and apportioned by the respondents is correct, and that all proper deductions and allowances have been made in computing the same, then we find that the said assessment should stand in its present amount, that is to say, at the rateable value of 300*l.* per mile, exclusive of stations.

If the Court shall be of opinion, that, besides the deductions allowed by the respondents in calculating the rateable value of the said Railway, the Company are entitled to any further deductions in respect of any estimated sum for the renewal and reproduction of the permanent way, being No. 9 in the last-mentioned list of deductions, or to any per-centage on the estimated amount of capital invested in moveable stock employed in the Company's trade, to form a fund for the renewal and reproduction of such stock, in addition to their actual annual expenditure for its repair and maintenance, being No. 10 in the last-mentioned list, then the assessment ought to be reduced accordingly from 300*l.* to the rateable value of 254*l.* per mile.

If the Court shall be of opinion that the principle on

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which the assessment is made is not correct, but that the principle on which the appellants contend that the rate ought to have been made is correct (subject to the same question as to the two renewal funds as above), then we direct that the rateable value of the Railway be taken at 30*l.* per mile, exclusive of stations; and the assessment be reduced accordingly, and the difference between the same and the present rate be refunded; and in the mean time, and subject to the opinion of the Court on the above facts, we direct that the present rate stand.

Whateley, Peacock, and Bros., for the respondents.—An allowance for renewal and reproduction is proper: *Reg. v. The London, Brighton, and South Coast Railway Company (a)*; but this has been provided for year by year out of annual repairs. As to the apportionment, the case must be governed by *Reg. v. Kingswinford (b)*. The respondents ascertain the net annual value of the portion of line in their parish, first, by ascertaining what a tenant from year to year would give for the whole line, and then, by apportioning that rent amongst the different parishes, there cannot be a tenancy of a portion of the line, therefore the inquiry must necessarily be what a tenant would give for the whole: *Reg. v. The London and South Western Railway Company (c)*, *Reg. v. The Grand Junction Railway Company (d)*, *Reg. v. The Cambridge Gas Light Company (e)*, *Reg. v. Mile End Old Town (f)*, *Reg. v. The Hammersmith Bridge Company (g)*. The Company contend that the trunk and branch lines are to be considered as distinct, but that cannot be, having regard to the statutes 8 & 9 Vict. c. lx, 9 & 10 Vict. c. xiv. The real circumstances of the occupation must be looked to, and so viewing them, the branch

(a) Ante, Vol. 6, p. 440; 15 Q. B. 313.

(b) 7 B. & C. 236.

(c) Ante, Vol. 2, p. 629; 1 Q. B. 558.

(d) Ante, Vol. 4, p. 1; 4 Q. B. 18.

(e) 8 A. & E. 73,

(f) 10 Q. B. 208.

(g) 15 Q. B. 369.

part of the trunk line, and the rateable value is to be portioned in that proportion which the gross receipts in the parish bear to the gross receipts of the whole, and not the net receipts in the parish bear to the net receipts of the whole. It is admitted by the appellants that they must distribute some of the expenses in the ratio of the traffic, and all the expenses must be distributed in the same manner. There cannot be an expense producing profit merely where incurred. Tunnels and cuttings are a charge on the general traffic, and when these expenses exceed the local earnings there must be a charge on the whole concern, as in the case of stations.

Sir *F. Kelly* and *Smirke* contra.—No allowance has yet been made for depreciation of the Railway, nor of the stock, and both of which the Company are entitled: *Reg. v. The London, Brighton, and South Coast Railway Company* (a). Local profit, or the difference between the gross earnings and the outgoings and deductions in each parish, is the rateable value in that parish: *Reg. v. The London, Brighton &c. Railway Company* (b); where the expenses are in proportion to the receipts, so that the gross and net receipts represent the same proportion, it is different: *Reg. v. Mile End Old Town* (c); but here it is not so. The appellants rely on the same local receipts as the respondents, but they confine their inquiry as to local expenses almost entirely to the branch, because the branch has a separate plant and offices. So the repairs of the way and stations are separate; such expenses as are “common to the entire branch” are properly distributed on the mileage principle. Where the whole cost of working a branch exceeds the earnings, it must be worthless, and then there is no rateable value: *Reg. v. The Manchester South Junction and Altrincham Railway Company* (d). It cannot be disputed that the branch

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(a) Ante, Vol. 6, p. 440; 15 Q. B. 313.

(b) Ib.

(c) 10 Q. B. 208.

(d) Not reported.

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line is part of the Great Western Railway Company; but inasmuch as the receipts and expenditure can be separated, the Company contend that the nearest approximation to the real local value of part of the entire concern is by separating the two lines, and confining the estimate of the receipts, working expenses, and repairs to those separate portions.

Cur. adv. vult.

June 7th.

LORD CAMPBELL, C. J., after expressing a hope that some legislative enactment might pass before the ensuing Term, which might relieve the Court from the difficulty of administering the existing law, said, that the rule laid down by the Parochial Assessment Act was easily applicable to the property which the legislature then had in contemplation, but was wholly inapplicable to a railway extending many miles through many parishes, with a trunk line and branches, the traffic upon its different sections varying materially, and the expense of working these different sections bearing no certain proportion to the earnings upon them. Required to determine how a Railway Company should be assessed in a parish through which a branch of the Railway passes, without any station within the parish, the traffic on this branch being comparatively small, and large outgoings being required, from the peculiarities of the locality, to keep in repair and to work the portion of the Railway within this parish, we are directed to consider the rent at which this section of the Railway might reasonably be expected to let from year to year free of all usual tenant's rates and taxes and tithe commutation rent charge; and the only guide we have as to deductions, is to deduct the probable annual cost of repairs, insurance, and other such expenses, without any intimation as to what we are to do with respect to tunnels or embankments, or standing engines employed exclusively within the parish, or locomotive engines employed on the whole line, or the general expenses of the directors who

manage the entire concern, or the charge arising from the maintenance of stations or the employment of police. If we settle all these and similar questions, we may be considered as legislators rather than as Judges, making rather than expounding the law. At all events we must proceed on a most improbable and nearly absurd supposition, that there may be found who would take the portion of the railway which passes through a single parish, and no more, as a tenant from year to year.

Without some alteration in or declaration of the law on this subject by the legislature, we foresee that, although we should give judgment between these parties, much trouble, litigation, and expense must still arise both to parishes and to Railway Companies throughout England.

Judgment was now delivered by

LORD CAMPBELL, C. J.—This case was argued before us in June last. Soon afterwards, we stated the extreme difficulty we felt in satisfactorily applying the provisions of the Parochial Assessment Act to the solution of the questions which it presents for our decision, and we expressed our conviction that they required the interposition of the legislature rather than the judgment of a Court of justice. Parliament, however, has not thought right to be present to deal with these questions, and it becomes our duty no longer to delay giving judgment, which the parties have a right to demand at our hands.

These considerations, however, obviously make it desirable, that, in our present judgment, we should limit ourselves as closely as we can to the decision of the points which necessarily arise, and govern ourselves strictly by the Parochial Assessment Act, and the principles laid down in former cases. Fortunately, we have received much assistance both from the clear statement of the

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case submitted to us, and from the succinct abstract of the argument of the counsel who appeared for the parties before us, to be found in the 15th volume of the Queen's Bench Reports.

The rate in question is imposed on the appellants in respect of their occupation of two miles and a half of the Railway in the respondent parish, and these two miles and a half are part of a line rather more than twenty-five miles in length, constituting what was originally intended to form an independent and entire Railway, to be called "The Berks and Hants Railway." It is now, however, what we will call a branch of the Great Western Railway, owned and worked by the appellants. Whether, for the purpose of this rate, these two miles and a half are to be considered as a part of this branch, treated in most material respects as an independent whole, or whether as part of the whole Great Western Railway, including herein the branch, without any distinction between branch and trunk, will be one of the most important points for our consideration. The appellants proceed on the former, the respondents on the latter assumption.

We think that it will clear our way to adopt, in the first place, for the sake of argument, the assumption of the respondents. Both parties have agreed that it is important to settle four points as cardinal to the decision of the case. First, the total gross annual receipts of the appellants from the whole line, including both trunk and branch. Secondly, the total gross annual receipts from the two miles and a half. Thirdly, the allowances and deductions which are to be made from the first-mentioned sum, so as to give the net rateable value of the whole line; and fourthly, the net rateable value of the two miles and a half. With respect to the first two of these, they are agreed; and although there be a difference as to the third, it is not so much in principle as in matter of fact: this difference we will settle first. The appellants, in addition to allow-

ices for annual repair of rails and framework, and of moveable stock, claimed to be allowed two specific sums for their ultimate renewal and reproduction. We feel the difficulty which exists in theory with regard to this claim. This has been well stated in a pamphlet, published since the argument by Mr. Smirke; but we fully considered the subject in coming to our decision in *The Queen v. The London and Brighton and South Coast Railway Company* (a), and we adhere to that decision. It is not necessary, indeed, to reconsider it now, for the respondents do not dispute it, contending that they have already made these deductions from the allowance for annual repairs. But as this allowance does not equal in amount the sum of allowances which the appellants have claimed under the two heads of annual repair and ultimate renewal, and as no objection is or could properly be made before us as on the ground of excess in their calculation, it is clear that, substantially, this allowance has not been made. Upon this point, therefore, our decision must be for the appellants. They admit, indeed, that they do not annually set aside any sum to form a distinct fund for this renewal and reproduction; but the case finds that they retain out of their annual revenue a reserve fund for all contingencies, including these items among them; and further, that although by annual repairs and partial renewals both the rails and moveable stock are maintained in an efficient state, yet this will not supersede as to either the necessity of that fundamental renewal and reproduction for which these deductions are claimed. We consider, however, this question concluded by the decision referred to; and the effect of this would be, at all events, to reduce the rateable value in the respondent parish from the first to the second sum agreed to in the case, namely, to 254*l.* per mile.

We have now, then, three terms out of the four settled. The remaining question is, what is the net rateable value of the two miles and a half? Now, as the net rateable

(a) Ante, Vol. 6, p. 440; 15 Q. B. 313.

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value is that which remains of the gross receipts after all just deductions are made, it might seem at first sight that we might confine our inquiry to the two miles and a half; and that we only encumber the investigation uselessly by introducing into it any consideration of the gross and rateable value of the whole line. But the circumstances of a Railway make this absolutely necessary: the inquiry may become, and undoubtedly does become, more complicated and difficult thereby; but it would be wholly incomplete and illusory even in its result unless we did so. Of the out-goings of a Railway some are general, having no more connexion with or influence on one part of the whole line than on any other, incurred for the sake of the whole line and contributing to the profits everywhere. Of course these must be distributed, and to every mile must be apportioned some share, on whatever principle the apportionment is to be settled. Some, again, seem purely local—a tunnel here, an inclined plane there (we purposely mention striking and definite peculiarities), yet even these are contributing to the earnings everywhere; without these the traffic on either side could have no existence. It would be wrong to set these wholly and exclusively against the receipts earned in the same part of the line. We need not dwell on this, because in principle some distribution is on all hands agreed to be necessary; the only difficulty is in determining what mode is to be adopted for making it justly,—a difficulty we believe actually insurmountable in fact, if strict mathematical accuracy were insisted on. It is our business, however, only to lay down the general rule; and, in applying it, much must be left, not only to the experience and acuteness, but also to the good sense, and good faith, and candour of the parties concerned, whose interests will be found in the end to be best consulted by this mode of dealing. How, then, are the deductions from the total gross revenue, which constitute the difference between it and the total net rateable value,

apportioned, so as to arrive at the actual sum which tutes the rateable value of the two miles and a half? is no difficulty in giving the first answer; indeed, ple and authority leave us no option,—it must be done ing on what is called the parochial principle. We are ig with a parochial question, with one in which the in- s of the several parishes on a line of Railway are quite ct. We are to ascertain what expenses are incurred in ing the gross receipts on the two miles and a half, what es (parochial or otherwise) they are liable to, what ly to be deducted for tenant's profits, and so on; the process in kind is to be gone through with regard to wo miles and a half as would be with regard to the e line if that were all in one parish. We need not repeat the reasoning which appears in our judgment e referred to. But, as we then said, and have now rt repeated, this principle does not preclude a consi- ion of charges and expenses, wherever arising locally, h are necessary for keeping the subject of assessment e value which is made the measure of that assess- : And further, we must add, that wherever it is d that such charges and expenses do in fact apply lly to every mile of railway, it is a convenient and able mode to arrive, by a mileage division, at the pro- onable part to be assigned to the miles in any particular h. This is no departure from the parochial principle, be assumed, as to particular charges (central superin- nce, for instance), that a separate investigation of as they actually arise in, or are referable to, a par- or parish, would lead us to the same result as a mile- istribution of the whole. It becomes, by the hypo- s, but another mode of arriving at it; in many cases l be the more convenient and just; in some, perhaps, y be the only practicable mode.

aving now laid down the principle, it would be right oply it to what the case finds as to the two modes

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which have been respectively adopted by the parties; and first, for convenience sake, to that of the appellants: "They," it is said, "have taken the gross receipts per mile per annum in the respondent parish, exactly as the respondents had done; and they deducted from these the actual expenses of each mile ascertained or estimated." If the case had stopped there, we should have supposed that they had strictly acted on the true principle, and we must have adopted their conclusion. But it is evident from what follows, that we should have been led into error. For the case goes on thus: "In order to do this, they ascertained the actual expenses incurred on the branch alone; and where those expenses were common to the entire branch, they divided such expenses by the number of miles in the branch, and they considered the result to be the expense of each mile in the branch. A small portion of the general expenses of the entire Railway, (being those of central superintendence, printing, and advertising), were apportioned on the branch in the ratio of the business or traffic upon it, and such portion was subdivided as before on the mileage principle." This explanation shews, that the appellants have, in fact, separated the branch from the trunk, except as to what they call a small portion of the general expenses of the entire Railway, and then divided the expenses of the branch thus separated on the mileage principle. We do not think them necessarily wrong in this last particular: it may have been no practical departure from the true principle, but only an allowable instance of what we have above stated to be a convenient practice, where the actual expenses were the same on every mile; and as no objection is made to this by the respondents, we must assume that it was so. But the separation of the branch from the trunk is, in its effect, the substantial ground of dispute between the two parties, producing, it may be said, nearly the whole difference between 25*4*l. and 30*4*l. per mile; and unless they are justified in this, it is impossible that their mode of ascertaining the

able value can prevail, and we think they are not. We wish it to be distinctly understood that we come to this conclusion solely on the facts of this case. We are not far from saying that there may not be cases in which two lines, connected for many purposes and worked by the same Company, may yet have been kept so distinct by the nature or agreement which creates the connection, or by the circumstances under which they are worked, that, for the purpose of rating, they would have to be separately considered as two distinct subject-matters. When such cases arise, they must be dealt with according to their respective circumstances; but, in the present case, the fusion of the two lines is complete. The branch, as we have hitherto called it, is absorbed into the trunk, and whether the branch is one or the other, our decision must have been the same; for, by the case, it is found, that, by the 48th section of the special Act, the appellants were enabled to purchase, and the Company incorporated by that Act to sell and transfer, the undertaking to the appellants; and, on the completion of the purchase, the appellants were to take over and to hold the undertaking, the Company to be dissolved, and the building and works to become part of the Great Western Railway. Accordingly, the appellants became the purchasers and proprietors, and, by a subsequent Act, 9 & 10 Vict. c. xiv., it was enacted, that it should thenceforth become part of the Great Western Railway.

So much for what it is. And how has it been worked? The case finds, that, ever since its completion, and at the time of making the rate, it was and still is worked as part of the entire Railway, known by the name of the Great Western Railway; that a certain number of engines and carriages are appropriated to it, and a certain number of officers and servants employed exclusively on it. No separate account of receipts and expenditure in respect of it is kept, but such receipts and expenditure are included in the general half-yearly revenue accounts laid before the

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proprietors. No separate annual account in abstract, shewing the total receipts and expenditure in respect of it, is prepared by the appellants, so as to be furnished to the overseers of the poor of the several parishes through which the said branch passes, in conformity with the 8 & 9 Vict. c. 20, s. 107, (Railways Clauses Consolidation Act, 1845).

Thus, it appears both by the statutes and the acts of the appellants, that there is absolutely nothing to distinguish the miles in Tilehurst from miles in Paddington, Ealing, or any other parish on the original line. For the mere allotment of engines and carriages, or officers and servants, is nothing for the present purpose; it is merely an economical arrangement of the Company for the working of this part of their line. We conclude, therefore, that a rateable value, ascertained by considering twenty-five miles as a distinct whole, cannot be correct; and, therefore, we cannot adopt that which is proposed by the appellants.

The mode adopted by the respondents is now to be considered. The case finds, that, having ascertained the rateable value of the whole railway, minus the stations, they ascertained the gross actual annual receipts of the appellants in respect of each mile and portion of a mile of railway in their parish, and they assessed the appellants in respect of the said two miles and a half in the ratio "which such annual receipts bore to the gross annual receipts of the Company in respect of the entire Great Western Railway, trunk and branches, the rateable value of a mile of railway in the respondent parish being calculated in the same proportion to the rateable value of the whole line, exclusive of the stations, as the gross actual annual receipts in respect of such mile bore to the total of such actual annual receipts of the Company." Before we consider the general principle here stated, we should notice, in passing, the term "trunk and branches;" this is the only place in the case where the plural "branches" is used. We do not know whether this was

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intentional or not: if it were, as we are not informed of any circumstances relating to the other branch or branches, we cannot say whether it or they ought to have been amalgamated with the trunk for the present purpose. But, passing this by, it appears that the respondents have taken the deductions at the same rate for every mile of the railway; for they say, as the gross receipts of one mile to the gross receipts of the whole, so the rateable value of one mile to the rateable value of the whole: this is, in effect, to strike off from the gross receipts of a mile an aliquot part of the sum which is struck off from the gross receipts of the whole, and assumes at least that the expenses are at one uniform rate throughout the whole line. If the case were silent on this subject, we might have presumed that the respondents had ascertained this to be the fact, and then there would have been no objection to a mileage division; but the case, reasonably understood, excludes this, for it finds that the actual expenses of the company are not in the proportion of the actual gross receipts, either on the branch or throughout the entire railway; nor are either such gross receipts or such expenses at one uniform rate per mile throughout the entire railway." The counsel for the respondents laboured in vain to explain away the clear meaning of this passage, and, failing in that, they equally laboured in vain to shew that all the expenses on a Railway were necessarily to be distributed in calculation equally over the whole line.

In the result, we cannot adopt either of the modes suggested to us, or confirm the rate at either of the sums stated; the consequence must be, which we very much regret, that the award must be referred back to the learned arbitrators, to whom the parties, and we ourselves, are so much indebted for the labour and ability which they have bestowed on the case. We trust that the principles we have laid down will enable them to agree on a satisfactory rate, and that there may be no more litigation on the subject.

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We have said nothing in respect of the stations, as they seem to have been set aside from the matters in dispute, and very properly, by mutual consent.

Award referred back for amendment.

COURT OF COMMON PLEAS.

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Dec. 5th.

THE EAST ANGLIAN RAILWAY COMPANY v. THE EASTERN
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A Company, incorporated by Act of Parliament, for making and maintaining a Railway and works, was empowered to raise money to be applied in discharging the costs incurred in obtaining the Act, and the remainder towards making and maintaining the Railway and works; and the profits of the Company, after defraying the expenses of making, main-

taining, and working the Railway, were to be divided amongst the proprietors. The Company, so incorporated, afterwards covenanted with the plaintiffs, a Railway Company, to take a lease of their line, and to find the capital necessary for the construction of the branches and works authorised to be constructed by bills then pending in Parliament, and to pay the costs of preparing and promoting such bills:—*Held*, that the defendants, having a limited authority only, and being a corporation only for the purpose of making and maintaining the Railway sanctioned by the Act, could only apply their funds for the purposes provided by the statute; and that such an agreement was illegal though the object of it might have been the increase of the profit of their Railway.

THE declaration, which was in covenant, stated, that, before the making of the contract, there were four Railway Companies, each incorporated by a separate Act of Parliament: the Lynn and Ely Railway Company, the Ely and Huntingdon Railway Company, the Lynn and Dereham Railway Company, and the Eastern Counties Railway Company, the defendants; that the Lynn and Ely Company had introduced into Parliament, upon their own petition, four bills, for purposes connected with their Railway; that the three first-named Companies had agreed to amalgamate and form one Company, under the name and style of “The East Anglian Railways Company;” and that a bill was then pending in Parliament to give effect to such

agreement. It then stated, that the defendants, by an indenture, under their common seal, between themselves and the plaintiffs (comprehending the three first-named Companies since amalgamated by Act of Parliament) covenanted with the plaintiffs (amongst other things) to take a lease of their Railways, upon certain terms mentioned in the indenture, and to find the capital necessary for the construction of the extensions, branches, and works, authorised to be constructed by the bills then pending in Parliament, and to pay the costs of preparing and promoting such bills, whether the same should pass into law or not. That the bills were proceeded with, that two were passed, and that the costs of the bills, amounting to a large sum, had not been paid by the defendants to the plaintiffs.

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The defendants cravedoyer of the indenture, and, after setting it out, pleaded, that the plaintiffs had no authority to grant leases of their Railways to the defendants; that they had been unable to obtain Acts of Parliament for that purpose; that they had abandoned all intention of so doing; and that several shareholders of the defendants' Company had not assented to the making or executing of the indenture or the agreement therein contained. General demurrer.

Bramwell, with whom was *Wheeler*, in support of the demurrer.—The deed being admitted to be sealed by the corporation, *the Company* cannot defend the action on the ground that there are certain non-assenting shareholders, no notice that the deed was ultra vires the directors being alleged. If the non-assenting shareholders have any remedy, it is in equity: *Smith v. The Hull Glass Company* (a), *Ridley v. The Plymouth &c. Baking Company* (b), *Clarke v. The Imperial Gas Light Company* (c), *Hill v. The Manchester*

(a) 8 C. B. 668.

(b) 2 Exch. 711.

(c) 4 B. & Ad. 315.

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and *Salford Waterworks Company* (a). The deed being executed with all the formalities required by the Company's Act, the Company are liable. [*Jervis*, C. J.—Suppose the directors were to contract to take a theatre, with all the formalities, would the Company be liable?] It is submitted that they would, if for the purposes of the Railway: *Bosanquet v. Shortridge* (b), *The Mayor of Ludlow v. Charlton* (c), Com. Dig. Franchise, F. 11. Secondly, the Company are liable unless the directors are prohibited from entering into such a contract as this: *Palister v. The Mayor of Gravesend* (d). [*Maule*, J.—If the directors have no authority to enter into the contract, their act is not that of the Company, it is no contract as regards it. The directors are authorised to do certain things for a particular object; if they do acts beyond that object, though under the corporate seal, it would not be the act of the Company.] But this contract may have been necessary, in order to carry out the objects of the Company, and it is not alleged that it was not. If this is a plea of illegality, it ought to have been so pleaded: *Lewis v. Davison* (e), *Price v. Green* (f). [*Jervis*, C. J., cited *Grote v. The Chester and Holyhead Railway Company* (g).]

Sir *F. Kelly* (*Crowder* and *Bovill* with him).—The contract set out has been entered into in violation of the Acts of Parliament, and is therefore illegal; it is a contract to apply funds raised under Act of Parliament to purposes foreign to that Act, and for another Company; the declaration is therefore bad. The 6 & 7 Will. 4, c. cvi., incorporates the Company for making and maintaining the Railway and works authorised; and for that purpose it au-

(a) 2 B. & Ad. 544; 5 B. & Ad. 866.

(b) 4 Exch. 699.

(c) 6 M. & W. 815, 823.

(d) 19 L. J., C. P., 358.

(e) 4 M. & W. 654.

(f) 16 M. & W. 346.

(g) Ante, Vol. 5, p. 649; 2 Exch. 251.

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difference in this case.] He cited on this point *The Great Northern Railway Company v. The Eastern Counties Railway Company* (a), *Munt v. The Shrewsbury and Chester Railway Company* (b), *Rex v. Kilderby* (c). If the agreement is void the plaintiffs cannot recover at all, even for the costs of soliciting bills.

Bramwell, in reply, cited *The Queen v. The Great North of England Railway Company* (d), *Nicholls v. Stretton* (e).

Cur. adv. vult.

JERVIS, C. J., now delivered the judgment of the Court.—The question for the opinion of the Court is, whether, upon this record, the plaintiffs can maintain their action; and we are of opinion that they cannot, and that the defendants are entitled to our judgment. The defendants are incorporated by the statute 6 & 7 Will. 4, c. cvi., the first section of which enacts, that certain persons shall be united into a Company for making and maintaining the Railway mentioned in that section, and other works by that Act authorised, and for other purposes in that Act declared, and for that purpose shall be one body corporate, by the name and style of “The Eastern Counties Railway Company,” and have perpetual succession and a common seal. The third section empowers the Company to raise a sum of money for making and maintaining the said Railway and other works authorised by the Act; and the fifth section directs the money so raised to be expended towards making and maintaining the said Railway and other works, and in otherwise carrying the Act into execution. The money to be raised on mortgage is to be applied in the same way (section 246); and the profits of the Company, after defraying the expenses of making, maintaining, and

(a) 21 L. J., Ch., 837.

(b) 20 L. J., Ch., 169.

(c) 1 Saund, 309 c.

(d) 9 Q. B. 315.

(e) 10 Q. B. 346.

working the said Railway, are to be accounted for and divided amongst the proprietors of the undertaking (sections 170, 171).

This Act is a public Act, accessible to all and supposed to be known to all; and the plaintiffs must therefore be presumed to have dealt with the defendants with a full knowledge of their respective rights, whatever those rights may be. It is clear that the defendants have a limited authority only, and are a corporation only for the purpose of making and maintaining the Railway sanctioned by the Act, and that their funds can only be applied for the purposes directed and provided for by the statute. Indeed, it is not contended that a Company so constituted can engage in new trades not contemplated by their Act; but it is said, that they may embark in other undertakings, however various, provided the object of the directors be to increase the profit of their own Railway. This, in truth, is the same proposition in another form; for if the Company cannot carry on a new trade because it is not contemplated by the Act, they cannot embark in other undertakings not sanctioned by their Act, merely because they hope the speculation may ultimately increase the profit of the shareholders. They cannot engage in a new trade, because they are a corporation only for the purpose of making and maintaining the Eastern Counties Railway. What additional power do they acquire, from the fact that the undertaking may in some way benefit their line? Whatever be their object or prospect of success, they are still but a corporation for the purpose only of making and maintaining the Eastern Counties Railway; and if they cannot embark in new trades because they have only a limited authority, for the same reason they can do nothing not authorised by their Act, and not within the scope of their authority. Every proprietor, when he takes shares, has a right to expect that the conditions upon which the Act was obtained will be performed; and it is no sufficient answer to a shareholder expecting his dividend, that the money has

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been expended upon an undertaking which at some remote period may be highly beneficial to the line. The public also has an interest in the proper administration of the powers conferred by the Act. The comfort and safety of the line may be seriously impaired if the money supposed to be necessary and destined by Parliament for the maintenance of the Railway be expended in other undertakings not contemplated when the Act was obtained, and not expressly sanctioned by the legislature.

The cases in equity which have been cited proceeded upon this view of the subject, and were decided, not because the particular act restrained by injunction was a breach of trust, but because it was not within the scope of the directors' authority, was not justified by the statute, and was therefore illegal. In *Colman v. The Eastern Counties Railway Company* (a), the Master of the Rolls says, "It has been very properly admitted that Railway Companies have no right to enter into new trades or businesses not pointed out by their Acts; but it has been contended, that they have a right to pledge, without limit, the funds of the Company in the encouragement of other transactions, however various and extensive, provided the object of that liability is to increase the traffic upon the Railway, and thereby to increase the profit to the shareholders. There is, however, no authority for any thing of that kind." So, in *Salomons v. Laing* (b), he says, "A Railway Company, incorporated by Act of Parliament, is bound to apply all the monies and property of the Company for the purposes directed and provided for by the Act, and for no other purpose whatsoever." The same principle was adopted by the Lord Chancellor in the case of *Bagshawe v. The Eastern Union Railway Company* (c), by Lord Cranworth in the case of *Beman v. Rufford* (d), and, as we are told, by Vice-

(a) Ante, Vol. 4, p. 513; 10 Beav. 1.

(b) Ante, Vol. 6, p. 289; 12 Beav. 352.

(c) Ante. Vol. 6, p. 152; 2 Mac. & G. 389.

(d) Ante, p. 48.

Chancellor *Turner* in the case of *The Great Northern Railway Company v. The Eastern Counties Railway Company*(a).

In the last two cases, the learned Judges treated questions similar to the present as purely legal questions, and therefore directed cases to be stated for the opinion of a Court of law ; but, at the same time, expressed their opinion that the contracts were illegal, and therefore void. If the contract is illegal, as being contrary to the Act of Parliament, it is unnecessary to consider the effect of dissenting shareholders; for, if the Company is a corporation only for a limited purpose, and a contract like that under discussion is not within their authority, the assent of all the shareholders to such a contract, though it may make them all personally liable to perform such contract, would not bind them in their corporate capacity, or render liable their corporate funds.

But it is said, that it does not sufficiently appear upon this record that the bills in Parliament, and for which the defendants covenanted to pay the costs, were not connected with the defendants' Railway. If Railway Companies could embark in undertakings collateral to their main line, merely because the main line might in the result be benefited, there would be much in this objection; but, upon the view which we have above expressed, the objection cannot prevail. We know that each of the four litigant Companies has a separate Act of Parliament; we know that the statute incorporating the defendants' Company gives no authority respecting the bills promoted by the plaintiffs; and we are therefore bound to say, that any contract relating to such bills is not justified by the Act of Parliament—is not within the scope of the authority of the Company as a corporation, and is therefore void. For these reasons we are of opinion that there ought to be judgment for the defendants.

Judgment for the defendants.

(a) 21 L. J., Ch., 837.

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HUTCHINSON v. THE SURREY CONSUMERS GAS LIGHT AND
COKE ASSOCIATION.

A Joint-stock Company, completely registered, is not liable for work done for them during provisional registration, or previously.

THIS was an action of debt for work done by the plaintiff, as an engineer, in the formation of the above Association, and for salary agreed to be paid. Plea: First, payment into Court of 50*l.*, and never indebted ultra. Second, payment.

The cause was tried before *Jervis*, C. J., at the Sittings at Guildhall after Trinity Term last, when it appeared that one Byron, in February, 1848, acting with others as promoters of the intended Association, engaged the plaintiff as engineer, at a salary of 500*l.* per annum. The Company became provisionally registered in November, 1848, and completely registered in May, 1849. The plaintiff devoted his whole time before the complete registration of the Company, and for some time afterwards, to the service of the Company. The Lord Chief Justice ruled that the plaintiff was not entitled to recover against the Company for services rendered before complete registration, nor upon the contract made before provisional registration; and left it to the jury to say whether enough had been paid into Court for the plaintiff's services after complete registration; they found that it had.

Byles, Serjt., now (a) moved for a rule to set aside the verdict, and for a new trial, on the ground of misdirection. The jury ought to have been told that the defendants were liable, under the 23rd section of 7 & 8 Vict. c. 110, which empowers them to contract for services necessarily required for establishing the Company. [*Maule*, J.—You can-

(a) Before *Jervis*, C. J., *Maule*, J., *Williams*, J., and *Talfourd*, J.

not sue a completely registered Company for work done for a provisionally registered Company and at their request.] It is submitted, that you can, at any rate where, as in this case, there was an express contract to pay 500*l.* a year. [*Maule, J.*—But that was before provisional registration.] There was, however, evidence of adoption by the Company after provisional registration.

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MAULE, J.—The direction of the Lord Chief Justice was perfectly correct; it was, that the 23rd section of 7 & 8 Vict. c. 110, which enables the promoters of a Company provisionally registered to make certain contracts, did not affect this contract, which was made before provisional registration, as against the Company completely registered. No point was made as to the effect from adoption subsequent to provisional registration, which might possibly have been considered as a contract made after provisional registration; nor was any point made as to how far such a contract would bind the Company after complete registration. There will therefore be no rule.

WILLIAMS, J.—The ground taken at the trial was, that the contract had been made before provisional registration, which the Company was bound to perform after complete registration. I think that a contract made by the promoters before provisional registration is not binding on the Company.

TALFOURD, J., and JERVIS, C. J., concurred.

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*Nov. 10th &
11th.*

The 50th section of 11 & 12 Vict. c. 45, applies only where a Company is sued *quâ* Company, and not to actions brought against individual contributories. The 62nd section applies where all or some of the contributories individually are sued.

BEARDSHAW *v.* LORD LONDESBOROUGH.

ASSUMPSIT for money lent, money paid, money had and received, and on an account stated.

Second plea, except as to the money alleged to have been lent and advanced to, and paid, laid out, and expended for, the defendant, that, on the 1st of September, A. D. 1845, divers persons projected a line of Railway, to be constructed between Dover and Deal by a public Company, to be called "The Dover and Deal Railway and Cinque Ports, Thanet, and Coast Junction Company;" and thereupon a committee was formed for the purpose of considering and carrying out the said project, and which committee was composed of the defendant and others. That it was determined by the said committee to form a public Company for the purpose of constructing the said Railway, with a capital, &c.; and that thereupon, afterwards, on the 2nd of October, A. D. 1845, the said intended Company was provisionally and in all respects duly registered, in conformity with the requirements of the Act of Parliament; and that St. Pierre Butler Hook and George Thomas Thompson were registered as the promoters of the said Company; and the said promoters thereof, from the time of such registration as aforesaid, thenceforth used the said name of the said Company. That the said promoters of the said Company proceeded to form the same under such name, and with such addition thereto as aforesaid, and for that purpose allotted and issued divers shares; and that one hundred of such shares were then allotted to the defendant, who then became, and was, and remained a shareholder in and a member of the said Company; and two hundred shares were then also allotted and issued to the plaintiff; upon receipt whereof he paid to the said Company, to wit, to the defendant and the other members of the said Company, who then had and received from him,

bruary, A. D. 1846, applied to Parliament for an Act to incorporate the said Company, but failed in obtaining it; and that the said Company never was incorporated by Act of Parliament; whereupon the said money, so as the said had and received from the plaintiff, became money so received to his use as in the declaration mentioned. The plea then set out a petition to the Lord Chancellor, a shareholder, praying that the Company might be wound up, under the Joint-stock Companies Winding-up Act, the advertising of the petition in the London Gazette, the order of the Lord Chancellor that the Company should be wound up, and the reference to the Master of the High Court for that purpose; and it then proceeded:—

And afterwards, and within fourteen days from the publication of the first of the said advertisements, the said defendant did, by writing under his hand, duly appoint one H. Croysdill to be official manager of the said Company, and the said H. Croysdill then accepted the said appointment, and then became, and was, and is, the official manager of the said Company. That every step, matter, thing, and thing required by law towards the winding-up of the said Company hath been duly had. That paying and receiving in this plea mentioned is the same as paying and receiving in the declaration mentioned, with which the defendant avers that he never had and received the money otherwise than as aforesaid; and that

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on an account therein alleged to have been stated, is a promise implied by law from the said alleged receipt of the said money and from the premises, and not otherwise. That this action is brought by the plaintiff against the defendant, as and being a member of the said Company, and not upon, nor does the same in anywise arise out of the individual liability of the defendant apart from the said Company; and that the same action is substantially and in effect an action against the said Company. That the said account in the declaration mentioned was so stated, as therein alleged, of and concerning the said money so by the plaintiff paid by way of deposit as in this plea aforesaid, and so had and received as aforesaid, and not otherwise.—Verification.

Special demurrer and joinder.

J. Brown (Channell, Serjt., with him) in support of the demurrer.—The substance of the plea is, that the action should have been brought against the official manager under 11 & 12 Vict. c. 45, s. 50 (a). The case does not fall

(a) Which enacts, "That, after the appointment of any official manager under this Act, all actions, suits, and other proceedings, at law or in equity, which might have been commenced, instituted, or prosecuted by or on behalf of the Company with respect to which such appointment shall be made, against any persons, whether contributories of the Company or not, shall be commenced or instituted and prosecuted by the official manager, by the style and designation of "the official manager" of such Company (describing it under the style or firm by which it is

described in the order absolute), as the nominal plaintiff or petitioner, for and on behalf of such Company, and that whether there be one or more official manager or managers; and that all debts which might have been proved by or on behalf of the Company against the estate of any bankrupt or insolvent debtor to the Company, shall and may be proved against such estate by the official manager of such Company, by the style and designation aforesaid; and that all actions, suits, and proceedings at law or in equity, to be commenced or instituted by any persons,

within that section, the action being against the defendant personally. The plea alleges, that the action is brought against the defendant "as and being a member of the Company;" and it is, in truth, against a contributory. The 50th section, therefore, is not applicable. The 58th section (a) saves the plaintiff's common law remedy. The 57th, 62nd, 71st, and 73rd sections explain the 50th. This cannot be considered as an action against the Company, the plaintiff being a member.

Willes (with whom were *Byles*, Serjt., and *Bramwell*) in support of the plea. The plea is good. This is a Company within the Winding-up Acts, and the action is against the Company within 11 & 12 Vict. c. 45, s. 50. A Company is a partnership, association, or Company corporate or incorporate, to which the Act applies (b). The plaintiff and defendant are both contributories: *Walters v. Spottiswoode* (c),

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whether contributories of such Company or otherwise, against such Company, or any person duly authorised to be sued as the nominal defendant on behalf of the same, shall and lawfully may be commenced, instituted, and prosecuted against the official manager of such Company (by such style and designation as aforesaid), as the nominal defendant for and on behalf of such Company, and that whether there be one or more such official manager or managers."

(a) Which enacts, "That, except as is by this Act expressly provided, nothing in this Act contained, nor any petition or order under the same for the dissolution and winding up or for the winding up of any Company, shall extend or enlarge, diminish, prejudice, or in anywise al-

ter or affect the rights or remedies of creditors, or other persons not being contributories of the Company, or the rights or remedies of creditors being also contributories, but being creditors of the Company upon a distinct and independent account, whether against the Company or against any of the contributories of the same, nor the rights or remedies of the Company against any contributories or other persons, nor shall alter or affect any contracts or engagements entered into by or with the Company or any person acting on behalf of the same, previously to any such petition, nor any actions, suits, or other proceedings pending at the date of such petition."

(b) Sect. 3.

(c) Ante, Vol. 4, p. 321; 15 M. & W. 501.

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intention of the Act, is, that this is not an action against the Company under that section. The most obvious meaning of an action being brought against a Company is where the Company is named as the defendant. There is another alternative, when the action is brought against some other person authorised to be sued instead of the Company, as nominal defendant—whether the action is so brought must be determined by what appears on the record. It seems to me that this affords a reason for considering that “actions against the Company” mean actions brought against the Company or against the person authorised to be sued as the nominal defendant. The defendant’s construction would bring under the 50th clause other persons not sued as nominal defendants or described as the Company, but yet charged with the liabilities of the Company. The 62nd section seems to throw a great deal of light upon the subject. It does not furnish the defendant with a mode of barring an action brought against him as contributory, but only provides that “the Master may, if he think fit, give permission that the action should be defended by the official manager.” If it is said that a defendant in an action in which he is personally sued is entitled at once to bar the plaintiff by a plea like this, you would be putting upon the jury a complicate and difficult inquiry as to the circumstances under which the defendant assumed to represent the Company. The scope and spirit of the Act seem to be, that persons interested in a Company may have the affairs wound up, but that third persons are not to be in any degree debarred from having the same judgments and executions against the same persons as before. They are to be just as well off as before, except in certain formal and immaterial respects, in which their interests have not been prejudiced, but which would be useful in furthering the winding up, all substantial rights being saved. That is the object of the Act, and it contains express provisions that it

is not to be construed as taking away any rights or remedies except where they are expressly taken away; and when they are taken away, there is always a sufficient equivalent given for them. When a person sues the official manager he is just as well off as if he sued the Company. If it were held that an action like this could not be brought against an individual, but must be brought against the official manager, that would be taking away a substantial right which existed before. A plaintiff, before the Act, might have joined different causes of action—some of them against the defendant as a member of the Company, and others of a private nature. Thus the plaintiff might have sued in the same action for goods sold to Lord Londesborough individually, and others sold to the Company; but if we were to hold that, since the Act, two such claims could not be joined, that would be taking away a right of the plaintiff. Without going into detail, there might be many such cases, in which I apprehend that the plaintiff would have a perfect right to join different claims. Now, if we held that the 50th section applies where the defendants are not called a Company on the record, a portion of such claims might be barred, which would be very inconvenient. I also think, that the construction which we now put on the Act is the most literal, independent of the question of convenience. I therefore think that the plea is no answer to the action.

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WILLIAMS, J., and TALFOURD, J., concurred.

Judgment for the plaintiff.

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COURT OF QUEEN'S BENCH.

*Hilary Term, 1852.**April 27th.* SIR T. R. GAGE *v.* THE NEWMARKET RAILWAY COMPANY.

A Railway Company, being about to construct a railway through the plaintiff's land, and having a bill before Parliament for that purpose, covenanted with him, "that, in the event of the bill being passed in the present session of Parliament, the Company shall, before they shall enter upon any part of the land, pay the sum of 4900*l.* purchase-money, for any portion of his land not exceeding forty three acres, which the Company may under the powers of their Act require and take for the purposes of their undertaking; that, in addition to purchase-money, the Company

COVENANT.—The declaration, which was upon articles of agreement between the defendants and the plaintiff, stated—after reciting, that it was proposed by the defendants to construct a Railway from Newmarket to Bury St. Edmund's, and that for that purpose a bill had been introduced into Parliament and read a second time, and that the line would pass through the land of the plaintiff; and that the plaintiff, being apprehensive that injury would be done to his property, had caused intimation of his intention to oppose the bill to be given to the promoters; and that the Company were desirous of coming to an agreement with the plaintiff: The said Company, for the consideration therein mentioned, did covenant and agree with the plaintiff, that, in the event of the said bill therein recited as thereinbefore mentioned, and then before Parliament, being passed in the then present session of Parliament, the said Company should and would, within a reasonable time in that behalf after the passing of the said bill, and before the said Company should enter upon any part of the land of the plaintiff, pay to the plaintiff, his heirs or assigns, the sum of 4900*l.* purchase money for any portion of his land, not exceeding forty-three acres, which the said Company might, under the powers of their Act, require

shall pay to the plaintiff, before they shall enter upon any part of the said land, the sum of 7100*l.*, as a landlord's compensation for the damage arising to his estate by the severance thereof, in respect of the lands, not exceeding forty-three acres, to be taken by them:"—*Held*, First, that the Company never having entered upon any part of the plaintiff's land, he was not entitled to sue for either of those sums; Secondly, that an absolute covenant to pay the above sums within a reasonable time after the passing of the Act would have been ultra vires, and void.

nd take for the purposes of their undertaking; and further, that, in addition to such purchase money as aforesaid, the said Company should and would, within a reasonable time in that behalf after the passing of the said bill, and before they should enter upon any part of the said land, pay to the plaintiff, his heirs or assigns, the sum of 7100*l.* as landlord's compensation for the damage arising to his estate by the severance thereof, in respect of the land, not exceeding forty-three acres, to be taken by them; and that the Company should, at their own expense, settle all claims and demands which the plaintiff's tenants might be entitled to make or demand in consequence of their said undertaking—That the said bill, in the said articles of agreement mentioned, did pass and become law in the said session of Parliament; and that the plaintiff always was ready and willing to accept the said sum of 4900*l.* as the purchase money for any portion of his the plaintiff's said lands, not exceeding forty-three acres, which the defendants might, under the powers of their last-mentioned Act, require and take; and that the plaintiff was always ready and willing to accept and receive, in addition to the said purchase money, the said sum of 7100*l.*, in the said articles of agreement in that behalf mentioned as aforesaid, as landlord's compensation for the damage arising and to arise to the plaintiff's estate, in the said articles of agreement in that behalf mentioned, by the severance thereof, in respect of the said lands, not exceeding forty-three acres, to be taken by them; and that a reasonable time after the passing of the last-mentioned Act, for the defendants to pay to the plaintiff the said two sums of money above mentioned respectively, had elapsed; and that the plaintiff was always ready and willing and able to convey all such portions of his said lands in the said articles of agreement mentioned, as the defendants might require and take for the purposes of their said undertaking; of all which premises the defendants

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had notice; and that the defendants, after the passing of the last-mentioned Act, were requested by the plaintiff to pay to him the said two sums of money respectively; and that the plaintiff did give notice to the said defendants, that he, the plaintiff, was ready and willing to convey, &c.; and that a reasonable time for the said Company to select and take such portions of the plaintiff's said lands, for the purposes in that behalf aforesaid, had elapsed. Breach, non-payment.

The defendants set out the deed on oyer, which was made the 2nd day of March, A.D. 1847. After reciting as in the declaration is alleged, it proceeded: Now, these presents witness, and it is hereby agreed, that in the event of the bill hereinbefore mentioned being passed in the present session of Parliament, the said Company shall, before they shall enter upon any part of the lands of the said Sir T. R. Gage, in the said county of Suffolk, pay to the said Sir T. R. Gage, his heirs or assigns, the sum of 4900*l.* purchase money for any portion of his lands, not exceeding forty-three acres, which the said Company may, under the powers of their Act, require and take for the purposes of their undertaking; that, in addition to the purchase money as aforesaid, the said Company shall pay to the said Sir Thomas Rokewode Gage, his heirs or assigns, before they shall enter upon any part of the said lands, the sum of 7100*l.* as landlord's compensation for the damage arising to his estate by the severance thereof in respect of the lands, not exceeding forty-three acres, to be taken by them; that, in addition to the purchase money and compensation for severance, the said Company shall, if required by the said Sir Thomas Rokewode Gage, take at a valuation the timber and timber-like trees and other wood that it shall be necessary to remove; that the Company shall, at their own expense, settle all claims and demands which the tenants of Sir Thomas Rokewode Gage may be entitled to make or demand in consequence of the said undertaking. [Then followed, amongst others, cove-

nants that Sir T. R. Gage and his tenants should have access to and from the lands severed by the Railway, by crossings; that if, during the progress of the Railway, any buildings on the lands of Sir T. R. Gage should be pulled down or severed by or in the making of the Railway, the Company should rebuild the same, or pay compensation for the same, at the option of Sir T. R. Gage; that the Company, in the event of the Railway being formed through the estates of Sir T. R. Gage, would erect a station on his lands, and cause all trains to stop at such station, excepting express and mail-trains; that the Company should not make any spoil banks on the property of Sir T. R. Gage, except under certain conditions, nor exercise on his lands the powers given by the Railways Clauses Consolidation Act, 1845, or the Lands Clauses Consolidation Act, 1845, except in certain cases, without the special license and consent of Sir T. R. Gage in writing; that Sir T. R. Gage should be entitled to the top soil of the land taken by the Company.] And the defendants then pleaded that the extended line of railway and works mentioned in the said articles of agreement and in the said Railway Act, authorised to be made, hath not, nor hath any part thereof, been made or constructed, or begun to be made or constructed; and that the defendants have not required or taken, for the purposes of their said undertaking or otherwise, any part of the plaintiff's said lands in the said agreement mentioned, or any lands or tenements of the plaintiff whatsoever; nor have the defendants ever given any notice of requiring or taking any of the said lands in the said articles of agreement mentioned, or any lands or tenements of the plaintiff; nor have they ever agreed with the plaintiff, or any person or persons, for the purchase or taking of any such lands or tenements as aforesaid, otherwise than by the said articles of agreement.—Verification.

General demurrer and joinder.

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J. Addison, in support of the demurrer (a).—The taking of the land was not a condition precedent to the payment of the money: *Pordage v. Cole* (b). There are here two considerations for the defendants' covenant: one the passing of the bill, and the other the giving up of the land when required. The one has been received, and the other may be when the Company please. The expiration of the compulsory powers does not affect the defendants' obligation: *Webb v. The Direct London and Portsmouth Railway Company* (c), *Pilbrow v. Pilbrow's Atmospheric Railway Company* (d), *Bland v. Cowley* (e). The case of *Preston v. The Liverpool and Manchester &c. Junction Railway Company* (f), strictly applies, and is conclusive.

Bramwell (*J. Brown* with him) contra.—The land must be taken before the Company can be called upon to pay. The plaintiff clearly intended to guard against his land being taken until payment, and he is not entitled to his money until entry. The purchase money is for land actually taken, and the damage that is to be paid for is severance. *Webb v. The London and Portsmouth Direct Railway Company* has been doubted on appeal (g), and much shaken by *Lord J. Stuart v. The London and North Western Railway Company* (h). Secondly, the covenant is unlawful, and ultra vires: *The East Anglian Railway Company v. The Eastern Counties Railway Company* (i), *Lord Howden v. Simpson* (k).

J. Addison, in reply.

Cur. adv. vult.

(a) Before Lord Campbell, C. J.,
Wightman, J., Erle, J., and Cromp-
ton, J.

(b) 1 Wms. Saund. 320.

(c) Ante, p. 9; 9 Hare, 129.

(d) Ante, Vol. 4, p. 683; 5 C.
 B. 444.

(e) Ante, Vol. 6, p. 756; 6 Exch.

522.

(f) Ante, p. 1; 1 Sim., N. S.,
 586.

(g) Ante, p. 20; 9 Hare, 129.

(h) Ante, p. 25.

(i) Ante, p. 150.

(k) 10 A. & E. 793; 3 My. &
 Cr. 97; 9 C. & F. 61.

Lord CAMPBELL, C. J., now delivered the judgment of the Court.—We are of opinion that the defendants are entitled to our judgment. Taking the deed as set out on oyer, we think there is no breach well assigned upon it. The covenant there, without saying anything, as the declaration does, about “reasonable time,” is merely in these words: “That in the event of the bill hereinbefore mentioned being passed in the present session of Parliament, the said Company shall, before they shall enter upon any part of the lands of the said Sir Thomas Rokewode Gage, in the said county of Suffolk, pay to the said Sir Thomas Rokewode Gage, his heirs or assigns, the sum of 4900*l*. purchase money, for any portion of his lands, not exceeding forty-three acres, which the said Company may, under the powers of their Act, require and take for the purposes of their undertaking; that, in addition to purchase money as aforesaid, the said Company shall pay to the said Sir Thomas Rokewode Gage, his heirs and assigns, before they shall enter upon any part of the said lands, the sum of 7100*l*., as a landlord’s compensation for the damage arising to his estate by the severance thereof, in respect of the lands, not exceeding forty-three acres, to be taken by them.”

The question we have to determine is, whether, the Company never having entered upon any part of the plaintiff’s lands, he is now entitled to sue for these two sums, or either of them. The 4900*l*. is declared to be the purchase money for the land to be required and taken, and the only time of payment mentioned is before the Company enter upon the land; therefore, if no land is required or taken, and the Company never enter on any part of the land, there seems great difficulty in saying that there has been a breach of covenant in not paying the money. So, the 7100*l*. is declared to be a compensation for severance of the land taken from the rest of the plaintiff’s land, and the same time of payment is defined. But there has been

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no severance to be compensated, and the time of payment has not arrived. The deed does not bargain for a sum of money to be paid absolutely by the Company to the plaintiff as a consideration for his withdrawing his opposition to the bill, but provides a peculiar mode of estimating the value of the land to be taken, and of the compensation to be made for severance and damage, instead of the modes pointed out by the general Acts upon this subject.

We therefore do not think that the Company can be considered as having absolutely covenanted to pay 12,000*l.* to the plaintiff in a reasonable time after the passing of the Act.

If this deed could bear such a construction, we should have thought it so far ultra vires and void. Here the Railway Company are the covenantors, and if the present action lies, the capital paid up by the shareholders must be answerable for the damages to be recovered. We consider that this would be a misappropriation of the funds of the Company, which the directors could not lawfully make.

All the cases relied upon by the plaintiff's counsel are clearly distinguishable from the present, except *Webb v. The Direct London and Portsmouth Railway Company* (a), before Sir G. Turner, V. C. Notwithstanding our high respect for that learned Judge, we cannot concur in the reasons for his decision; and although it has not been expressly overturned, its authority was greatly shaken when it came before the Lords Justices of Appeal. We do not feel it necessary to give any opinion upon the case of *Bland v. Crowley* (b), in which the learned Judges of the Court of Exchequer were divided, as the deed there discussed varies materially from the present. Nor would it be proper to give any opinion upon *Lord J. Stuart v. The London and North Western Railway Company* (c), as we learn, that, when it

(a) Ante, p. 9; 9 Hare, 129. (b) Ante, Vol. 6, p. 756; 6 Exch. 522

(c) Ante, p. 25.

fore the Lords Justices of Appeal, it was sent by be decided in a Court of law. We are happy to at the question in this case, being on the record, brought before a Court of Error. In the mean- ere must be judgment for the defendants.

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Judgment for defendants.

Hilary Term, 1852.

QUIS OF SALISBURY v. THE GREAT NORTHERN RAIL-
 WAY COMPANY.

Jan. 20th.

order of *Knight Bruce*, V. C., the following case
 and for the opinion of this Court:—

plaintiff for many years last passed has been and
 leased for the term of his life of certain lands sit-
 the parish of Hatfield, in the county of Herts;
 which consists of 1A. 3R. 1P., hereinafter particu-
 scribed, subject only to a tenancy from year to
 the tenants or farmers of the plaintiff; and the
 never had any greater estate than an estate for
 the same hereditaments. By “The Great Northern
 Act, 1846,” certain persons therein named, and
 cessors, were incorporated by the name of “The
 orthern Railway Company” (who were the defend-
 ve mentioned), for the purposes in this Act men-
 which Act received the Royal Assent on the 26th of
 1846; and the Lands Clauses Consolidation Act, 1845,
 Railways Clauses Consolidation Act, 1845, are in-
 d therewith. By the 27th section of the said Great
 Railway Act, 1846, it was enacted, that the
 f the said Company for the compulsory purchase
 for the purposes of the said Act should not be ex-

A notice by a
 Company to a
 landowner, re-
 quiring to take
 his land for the
 purpose of the
 undertaking, is
 an exercise of
 the powers for
 the compulsory
 purchase of land
 within the
 123rd section
 of the Lands
 Clauses Conso-
 lidation Act;
 and if, within
 the prescribed
 period, such no-
 tice be given,
 the steps neces-
 sary to complete
 the purchase
 may be taken af-
 ter that period.

An entry
 on land is not
 the exercise of
 any of the pow-
 ers of compul-
 sory purchase,
 but the exer-
 cise of a power
 for carrying the
 compulsory pur-
 chase into effect.

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exercised after the expiration of five years from the passing of that Act; and no other provision is made in the same Act limiting the time for the compulsory taking or purchase of lands. The defendants have not obtained an extension of time for the purchase by them of the said 1A. 3R. 1P. of land or any part thereof, pursuant to the statute 11 & 12 Vict. c. 3.

On the 21st of May, 1851, the defendants gave to the plaintiff a notice in writing of that date, whereby they required to purchase and take, for the purpose of the said Railway, the lands described in the schedule and plan thereunto annexed; and that the plaintiff should, before the expiration of twenty-one days, deliver to Messrs. Baxter, Rose, and Norton, a statement in writing (among other things) of the amount of the sum of money which the plaintiff was willing to receive in satisfaction and compensation for the value of such lands; which schedule described the said land (being that part of the plaintiff's lands hereinbefore mentioned) as all those pieces or parcels of land, hereditaments, and premises, delineated on the plan thereto annexed and therein coloured red, as the same were then or were about to be staked or set or otherwise marked out for the purpose of the before-mentioned Railway, containing together by admeasurement 1A. 3R. 1P., be the same more or less, situate in the parish of Hatfield, in the county of Hertford, and then or late in the occupation of &c.; and which hereditaments and premises above described are admitted to be part and parcel of certain lands, tenements, and hereditaments, delineated in the parliamentary plan and described in the book of reference thereto, deposited by the promoters of the London and York Railway Company, afterwards incorporated under the title of "The Great Northern Railway Company," with the Clerk of the Peace for the county of Hertford, and in such plan and book of reference distinguished by the numbers 136 and 143, in the said parish, together with the appur-

tenances therein mentioned. On the 26th of May, 1851, the plaintiff's solicitor, by letter to the said Messrs. Baxter, Rose, and Norton, who are the solicitors of the said Company, offered to accept 600*l.* as the price for the lands, the subject of the said notice, which offer the said Messrs. Baxter, Rose, and Norton, on the part of the defendants, declined, and thereupon the defendants proceeded to adopt measures for obtaining possession of the said lands, pursuant to the 84th and 85th sections of the Lands Clauses Consolidation Act, 1845; and, accordingly, on the 18th of June, 1851, they applied to two justices to appoint a surveyor in the manner prescribed by the said Act, to determine the value of the said piece of land; and the said justices appointed a surveyor, who subsequently valued the said land at 158*l.*; and on the 23rd of the same month the Company deposited the sum of 158*l.* in the Bank of England, in the name and with the privity of the Accountant-General of the Court of Chancery in England, to the credit of the plaintiff, and the same sum still remains so deposited; and on the 24th of the same month the defendants delivered to the plaintiff a bond, in the form and manner prescribed by the 85th section of the same Act. The defendants have taken no other measures towards the purchase of the land, save as herein stated; and they took no measures for obtaining possession of the land within five years from the passing of the special Act. On the 21st of May, 1851, the defendants served a notice in writing of that date on F. Farr and J. Farr, the tenants or occupiers of the plaintiff's said land, who hold the same as yearly tenants to the plaintiff, similar to the aforesaid notice served on the plaintiff; and on the 18th of June, 1851, the defendants and the said F. Farr and J. Farr, disagreeing on the amount of compensation to be paid to them as such tenants as aforesaid, the defendants caused the said F. Farr and J. Farr to be summoned to appear before two justices

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of the peace on the 24th of the same month of June, at the Court-house at Watford, in order that the said justices might determine the amount of compensation to be paid by the defendants to them; and, ultimately, on the 8th of July, 1851, the said justices awarded to the said F. Farr and J. Farr the sum of 25*l.* as compensation for their interests as tenants of the said piece of land; and the defendants thereupon tendered the said sum of 25*l.* to them; but they refused to receive the same, and consequently have not received the same, or any other compensation from the defendants for their interests as such tenants. In the same month of July the defendants threatened to enter upon and use the plaintiff's said land, without the consent or permission of the plaintiff or his solicitors or agents, but did not enter upon the same; and the plaintiff thereupon, on the 19th of July, 1851, filed his bill of complaint in the Court of Chancery against the defendants, praying (among other things) for an injunction to restrain the defendants from entering upon or taking possession of the plaintiff's said land, and from digging for gravel, or committing any other act of waste or spoil thereon. On the 4th of August, 1851, a motion was made in the said cause before Sir *J. L. Knight Bruce*, V.C., for an injunction according to the prayer of the bill; whereupon it was ordered (among other things) that a case should be made for the opinion of the Judges of this Court; and, upon the case being made, the question was to be, whether the defendants, under the circumstances hereinbefore stated, have or had, in the month of July last, the right to take the lands comprised in the said notice to treat, dated the 21st of May last, in the plaintiff's bill mentioned.

Bramwell (with whom was *Shapter*) for the plaintiff.—The mere giving the notice and taking the steps under section 85 of the Lands Clauses Consolidation Act, is not an exercise of the compulsory powers of the Company's

act. The defendants must have exercised all the compulsory powers within the five years(a), which they have not done. The Company would have acquired the legal estate on entry; and if they had entered within the prescribed period, they might have compelled a completion of their title, and the landowner might have proceeded under section 68: *Doe d. Armistead v. The North Staffordshire Railway Company* (b), *Worsley v. South Devon Railway Company* (c); but section 68 does not apply except as to land actually taken: *Burkinshaw v. The Birmingham and Oxford Junction Railway Company* (d). The notice to treat does not operate as a contract of sale and purchase: *Brocklebank v. The Whitehaven Junction Railway Company* (e), *Kinnersly v. The North Staffordshire Railway Company* (f), *Adams v. The London and Blackwall Railway Company* (g). The giving the notice alone is not an exercise of the compulsory powers, for there is an alternative of agreeing to the proposal. No doubt the landowner may force the Company to proceed: *Reg. v. The Birmingham and Oxford Junction Railway Company* (h); but the Company cannot take any further steps if their compulsory powers have expired. The giving of the notice is merely a preliminary step to the exercise of the compulsory power. But if the service of the notice be an exercise of one of the compulsory powers, *all* of the compulsory powers must be exercised within the five years, and none can be afterwards.

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Phipson (with whom was *Hugh Hill*) contra.—The power of compulsory purchase means the power of taking adversely to the owner; it is the placing the Company in a

(a) Sect 7 of the special Act.

(b) 16 Q. B. 527.

(c) 16 Q. B. 529.

(d) Ante, Vol. 6, p. 600; 5 Exch.
475.

(e) Ante, Vol. 5, p. 373.

(f) Ante, Vol. 6, p. 662.

(g) Ante, Vol. 6, p. 271.

(h) Ante, Vol. 6, p. 628.

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position to acquire the land and title at a future time, and that is exercised by giving the notice. There is no difference between a "compulsory purchase" within the special Act, and a "compulsory taking" within the 123rd section of the Lands Clauses Consolidation Act; and the power of compulsory purchase is exercised by the Company putting itself in a position to compel a purchase; and that which is necessary afterwards to complete the compulsory purchase is not an exercise of the compulsory powers; it is not necessary that the purchase should be completed within the prescribed period, but merely that within that period the Company should have acquired the right of taking the necessary steps: *Skerratt v. The North Staffordshire Railway Company* (a). A notice to treat is an inchoate purchase, and after that has been given in due time, it is competent for the landowner to compel the completion of the purchase: *The Birmingham and Oxford Junction Railway Company v. Reg.* (b), *Doo v. The London and Croydon Railway Company* (c), *Stone v. The Commercial Railway Company* (d), *Walker v. The Eastern Counties Railway Company* (e), *Salmon v. Randal* (f). In the *Edinburgh, &c., Railway Company v. The Monklands Railway Company* (g) Lord Justice Clerk says—"When we refer to the general Act and find that it enacts, that the powers of the promoters of the undertaking for the compulsory purchase or taking of lands should not be exercised after the prescribed period, we must look to see what the powers are that are characterised by that abbreviated expression. These are set forth in the Act at great length, and I think that all the sections imply that the land is taken by the notice. The object of the limitation is, I think, that the

(a) 5 Railw. Cas. 166.

(b) 20 L. J., Q. B., 304.

(c) Ante, Vol. 1, p. 257.

(d) Ante, Vol. 1, p. 375.

(e) Ante, Vol. 5, p. 469.

(f) 3 M. & Cr. 439.

(g) 12 Court of Sess. Cas. 1305.

owner of land is not to be kept in suspense during the whole period within which the Railway may be executed. When an owner gets notice that his land is to be taken, delay need take place; for he has power to go before a jury and compel a settlement of the price; or if he considers that the use of the land is more valuable to him, he may continue to retain it, if it is not wanted immediately for the construction of the Railway; but however this may be, the giving of the notice fixes that his land is to be taken. I therefore think that we are to consider the land as taken when the notice is given." [*Coleridge*, —None of the powers are to be exercised after five years. The notice does not exhaust *all* the powers.] It is submitted that it does. "The powers" means that which is necessary to place the Company in a position to acquire. This point has been already decided in *Sparrow v. The Bedford, Worcester, and Wolverhampton Railway Company* (a).

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Shapter, in reply, contended, that there was no compulsory purchase until the Company had done all in their power to convert the property, either by issuing their warrant to summon a jury or by entering into possession under section 85. That the notice might be withdrawn, and was not binding on both parties: *Reg. v. The London and South Western Railway Company* (b), *Ex parte Hannan* (c).

LORD CAMPBELL, C. J.—This case has been so fully and ably argued, and as our attention has been recently directed to the same subject and to the decisions upon the statutes, we may with safety and propriety express our opinion at once. The question put to us is, whether the defendants have, or in the month of July had, a right to take the lands of the plaintiff comprised in the notice dated the 21st of May,

(a) *Ante*, p. 92.

(b) *Ante*, Vol. 2, p. 629; 12 Q. B. 775.

(c) 1 Sim., N. S., 265.

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1851. We must look to see what was the state of facts existing in July. At that time a notice had been given by the Company that the land was required by them, and all the proceedings pointed out by section 85 of the Lands Clauses Consolidation Act had regularly taken place. This is not disputed. Then, what powers are conferred upon the Company when these proceedings are completed? "It shall be lawful for the promoters of the undertaking to enter upon and use such lands, without having first paid or deposited the purchase-money or compensation in other cases required to be paid or deposited by them before entering upon any lands." Now, the Company did not enter before the expiration of the period limited by their special Act for exercising their powers of compulsory purchase. The question is, whether they had a right to enter afterwards. It has been decided in *Doe d. Armistead v. The North Staffordshire Railway Company*, and in *Worsley v. The South Devon Railway Company*, that, if they had entered before the expiration of the prescribed period, an action of ejectment would not lie against them after it had expired, as their possession was still lawful. We must now consider what is the effect of their omitting to enter on the land before the expiration of that period. This very much depends on the question, whether the entry is to be considered as one of the powers for the compulsory purchase of the land. In my opinion, it is not. I think it was a power necessary for completing a compulsory purchase, and not a power for the compulsory purchase of the land; and I think that the powers for the compulsory purchase have been exercised within the five years. It is from the peculiarity of these transactions in regard to railways, that we are obliged to use terms which do not properly apply to them, when we speak of "purchase" and "contract." There is, in point of fact, no contract and no purchase; but the legislature has placed the parties in the same position as if there had been a contract of purchase with

consent of both parties. In *The Queen v. The Birmingham and Oxford Junction Railway Company*, we decided that, so far as the landowner is concerned, he is in the same position as if there had been a contract to purchase his land, and that he may compel the Company to complete after the expiration of the prescribed period; and that decision was affirmed in the Exchequer Chamber. So that, if notice be given by the Company within the prescribed period, it places the landowner in the position of a vendor, and the Company in that of a purchaser, so far as to give the former a right to force on the latter. But, then, it is said, and it may possibly be so, that there is no reciprocity. The Company may be bound, but the landowner free. I think, however, that we should require very distinct language in the statute to establish such a want of reciprocity; and I find nothing there to lead to such a view. I think, that, when a notice has been given by the Company, they are bound to take the land; and I see nothing to prevent the obvious conclusion, that this is a reciprocal transaction, by which both parties are equally bound. Looking to the various sections of the Act pointed out by Mr. *Phipson*, it is quite clear that the legislature considered that there was a purchase when the notice was given; that then both parties stand to each other in the relation of vendor and purchaser. The authorities, also, seem to me to be strongly in favour of this view. Notwithstanding some expressions of Lord *Cottenham* in the last case, *Adams v. The London and Blackwall Railway Company*, the same learned Judge has over and over again said, that, after the notice has been given, the parties are in the relation of vendor and purchaser. Then, there is the decision referred to in the Court of Session in Scotland, in which, although there was one dissenting Judge, Lord *Medwyn*,—than whom a more learned, more able, or more discriminating Judge never sat on the bench,—the rest of the Court agreed with the Lord Justice Clerk,

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who gave it as his opinion, that the parties stood in the relation of vendor and purchaser when once the notice was given, and that all subsequent proceedings were merely for the purpose of completing the title. I cannot agree with the reasoning of the late Vice-Chancellor of *England* in *Brocklebank v. The Whitehaven Junction Railway Company* and that case, as well as *Kinnersly v. The North Staffordshire Railway Company*, must, I think, now be considered as not only shaken, but overruled, by other decisions. I do not refer to the case before Vice-Chancellor *Turner*, because the injunction has been since allowed to remain until further discussion on appeal. I am, therefore, of opinion that we should certify that the defendants had a right, after the expiration of the five years, to enter upon this land.

PATTESON, J.—The question put to us is, whether the defendants had in July last a right to take the lands described in their notice. They can only have this right under section 85 of the Lands Clauses Consolidation Act because, except in the case there provided for, a Company cannot enter upon lands until the compensation has been determined and actually paid to the parties, or deposited in the Bank of England. That section enables the defendants to enter when delay might be very injurious, and when the landowner does not consent. It is conceded that all the steps required by that section have been taken within the five years, except the actual entry on the lands. But everything necessary to enable the Company to enter had been done. If they had actually entered they would have been no question, or, if the owner had resisted them, they might have taken advantage of section 9. The question is, whether, not having entered before the lapse of the five years, they are precluded from doing so now. That must depend upon the construction to be put upon section 27 of the special Act. Now, this is not a power exercised by the Company for the compulsory pur-

chase of the land; they have done all that before. Even if we did not agree with the decisions as to the notice itself being a binding bargain, there is a great deal more which has been done here; because there has been a demand of the purchase-money, which the owner is willing to take, and a claim by him of 600*l.*, and a refusal by the Company to pay that, and then a reference to surveyors to ascertain the amount to be paid, and a deposit of that sum in the Bank. However, I agree that the cases do go to the principle, that, as soon as the Company have given a notice to take land, they have exercised their powers of compulsory purchase, and that all the steps which they afterwards take are not an exercise of the powers of compulsory purchase, but the carrying into effect of that purchase. This is put very pointedly in the case cited from the Scotch Court, where Lord *Cockburn* draws a distinction between the compulsory powers of a Company, and the compulsory powers of the Act. The powers which the Company have to exercise for the purchase of land have been exercised when they give the notice. The powers of the Act to carry that power of the Company into effect, need not be exercised within the limited period. We have determined already in *Doe d. Armistead v. The North Staffordshire Railway Company*, that where a Company has taken possession under section 85, within the five years, they may continue in possession afterwards, although all the steps for completing their title had not been then taken. The argument was there used, that the landowner had no means of getting his money; but the Court said, he might initiate Proceedings under section 68. That answer applies equally to the present case.

COLERIDGE, J.—The question arises on the proper construction to be given to the words in section 27 of the special Act: “powers of the Company for the compulsory purchase of land.” It seems to me that there is a distinc-

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tion to be taken between a power to purchase ab initio and the steps which may be necessary to complete the purchase. In a large sense both may be included in the word "power," and that may serve to explain why the plural "powers" is used. The power to purchase is that which enables me to take land from a person who does not wish me to have it; and that is very different from what it may be necessary for me to do afterwards for the purpose of completing my title. The exercise of the power to purchase is doing any act which puts it in my power to take land against the will of its owner, and this must be considered without reference to time. The question whether there has been a compulsory purchase, might as well have arisen directly after the special Act was passed. If I stood alone on the effect of the notice, I should have no doubt that it would be sufficient for the purpose. The notice, it is said, makes the Company quasi purchaser and the landowner a quasi vendor; what he does afterwards, he does, not on his own, but on another's, land. It gives the Company the right to complete the purchase, and it gives him the right to compel the Company to do so. If he gains this right, is the landowner not to incur some corresponding liability? I quite agree that, if the legislature had pleased, it might have made this a one-sided contract; but it has not said so expressly, nor can it be inferred from any of the words used; and I cannot think that anything so unreasonable is to be presumed. But there is another way of considering this case in which it seems still more clear. There are certain things to be done under section 85, and all of these, except the actual entry on the lands, have been done. If all have been done, including the entry within the five years, there can be no question but that the title of the Company would have been complete. If the entry, which is alone wanting, be not itself a power of compulsory purchase, then you are taking away from the whole, which, it is admitted, does

include a power of compulsory purchase, something which is not a compulsory power. It follows, therefore, that the compulsory power must reside in that which remains.

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WIGHTMAN, J.—The only question is, whether the defendant had a right to enter after the expiration of the period prescribed by the compulsory clauses of the Act. It seems to me that this case is entirely governed by *Doe d. Armistead v. The North Staffordshire Railway Company*. It is admitted by Mr. Shapter that the proceedings for the purpose of taking the land were all perfectly regular, down to the taking of actual possession, which has not been done; and that, if that had been done on the last day, all would have been quite perfect, and the Company would have had a good title. Can it, then, really make any difference whether the taking possession has or has not occurred before the expiration of the power? If, after what they had done, the defendants had a right to enter and take possession, it is not an exercise of their compulsory powers when they enter, but a result of the previous exercise of them. They had done every thing necessary to entitle them to enter, and they are entitled to enter after the expiration of the period.

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By a memorandum of agreement under the corporate seal of a Railway Company, who were the promoters of a bill in Parliament for a branch line from their Railway to Spalding, with an extension to form a junction with the Ambergate Railway, the Company agreed, conditionally on the bill passing, to purchase the whole of the plaintiff's lands, of part of

HAWKES v. THE EASTERN COUNTIES RAILWAY COMPANY.

THIS was a suit instituted for the purpose of compelling specific performance of an agreement, dated the 27th of May, 1847, and entered into by the plaintiff, H. Hawkes, with the Eastern Counties Railway Company, and under their corporate seal. The agreement was as follows:—
 “Memorandum of agreement, made and entered into this 27th day of May, 1847, between the Eastern Counties Railway Company of the one part, and Henry Hawkes, of Spalding, in the county of Lincoln, of the other part: Whereas the said Company are now promoting a bill before Parliament, intituled ‘A Bill to enable the Eastern Counties Railway Company to make a Line from Wisbeach to Spalding, and to construct Docks at Spalding in connection therewith;’ and whereas the said proposed Railway is intended to pass near to the residence of the said

which he was owner in fee simple, and of the other part only tenant for life, and to obtain all necessary powers for enabling them to complete the purchase. One third only of the plaintiff's land was within the limits of deviation, and directly affected by the bill in Parliament. The objects of the agreement were, to induce the plaintiff to withdraw his opposition to the bill, and also to enable the Company to form, independently of Parliament, by means of a diverging line passing through a part of his lands not included in the deposited plans, a junction with the Ambergate Railway, in the event of the extension proposed by the Company's bill being rejected by Parliament. There was nothing in the agreement or evidence to shew that the plaintiff knew of the latter object of the Company.

The bill passed into an Act, with a clause prohibiting the formation of the extension line, but giving the Company power to purchase land, not exceeding thirty acres, for extraordinary purposes. The Company afterwards abandoned the whole of the proposed undertaking, and declined to perform the contract, whereupon the plaintiff filed his bill.

The Vice-Chancellor decreed specific performance of the contract, and directed a reference to the Master as to the plaintiff's title. The Master, by his report, having approved the title, the defendants took exceptions to the report, which were overruled by the Vice-Chancellor.

The Lord-Chancellor, on appeal, affirmed the decisions of the Court below on the hearing and exceptions.

Held, that an incorporated Railway Company, acting as the promoters of a bill for the extension of their line, are competent to bind themselves by contract with a landowner, conditionally on the Act passing, for the purchase of the whole of his property, although a portion only of it was directly affected by the bill.

A Company cannot release itself from contracts so entered into by impediments of their own creating, such as allowing the powers for the compulsory purchase of land or the completion of the Railway to expire, or omitting to pursue the forms prescribed by the Lands Clauses Consolidation Act, or upon any grounds of supposed illegality in the contract, of which the landowner is not shewn to be conscious.

(a) Lord St. Leonard's.

Henry Hawkes, situate at Spalding aforesaid, in such a manner as will most seriously damage the same, and render it unfit for habitation; and whereas the said Henry Hawkes has hitherto opposed the passing of the said bill into a law, but has consented to withdraw his opposition upon the said Company entering into the agreement hereinafter contained: Now, it is hereby agreed by and between the parties hereto, that, in the event of the said bill, in its present or any amended, modified, or altered form, for the like objects or any or either of them, and to which the said Eastern Counties Railway Company shall be parties or promoters, passing into a law, the said Eastern Counties Railway Company, their successors and assigns, shall and will purchase of and from the said Henry Hawkes and his heirs, and the said Henry Hawkes and his heirs shall and will sell, and he doth hereby accordingly agree to sell, to the said Company, their successors and assigns, all that capital messuage or tenement, with the granary, stables, coach-house, hot-house, conservatories, yards, and gardens thereunto adjoining, situate on the north side of the London road, in Spalding aforesaid, as the same are now occupied by the said Henry Hawkes, and also the pasture adjoining the said garden, also in the occupation of the said Henry Hawkes; all which said premises are more particularly described in the plan thereof annexed to these presents, and are therein coloured pink, at or for the price or sum of 8000*l.*, to be paid by the said Company within eighteen calendar months next after the passing of such bill as aforesaid; and, further, that in addition to such purchase money or sum of 8000*l.*, the said Company, their successors or assigns, shall and will, at the same time, pay to the said Henry Hawkes, his executors, administrators or assigns, the sum of 5000*l.*, as a compensation for the personal annoyance and inconvenience of compulsory eviction from his said residence; and shall and will bear, pay, and discharge all the costs of the said

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Henry Hawkes in relation to the making out of the title to the said premises and the conveyance thereof, or in anywise relating thereto. And it is hereby further agreed, that in case, from any cause whatever, other than the wilful default of the said Henry Hawkes and his heirs, the purchase shall not be completed at the expiration of the period of eighteen calendar months after the passing of such bill as aforesaid into a law, the said Company shall from thenceforth pay to the said Henry Hawkes and his heirs interest on the said respective sums of 8000*l.* and 5000*l.*, at the rate of 5*l.* per cent. per annum, by even and equal half-yearly payments, from the expiration of such period as aforesaid until the said purchase is completed; and further, that inasmuch as the said Henry Hawkes, under the will of his late father, is only tenant for life of the said capital messuage and of the greater part of the said hereditaments, with remainders over in strict settlement, the said Company will obtain all such powers and authorities, and do and perform all acts and things, and adopt all such measures, and pursue all such courses either in or by such bill as aforesaid or otherwise, as are, is, shall, or may be necessary or required for enabling the said Henry Hawkes and his heirs, and all other necessary parties, to sell and convey, and the said Company to purchase, the said hereditaments and premises from the said Henry Hawkes and his heirs, so as the same may become vested in the said Company on payment of the said several sums aforesaid, for an estate of inheritance in fee simple in possession. And whereas the said Henry Hawkes is the owner of a mill and premises used therewith, adjoining the proposed station of the Ambergate, Nottingham and Boston, and Eastern Junction Railway at Spalding aforesaid, and it has been arranged, as part of the terms upon which the said Henry Hawkes hath consented to withdraw his opposition to the said bill, that the Eastern Counties Railway Company shall enter into the agree-

ment hereinafter contained, in addition to the purchase of the said property hereinbefore provided for: Now, therefore, it is hereby further agreed, that, in the event of the said proposed Railway being made in such manner as to form a junction with the said proposed Ambergate, Nottingham and Boston, and Eastern Junction Railway, in the said parish of Spalding, the said Eastern Counties Railway Company shall and will, at their own expense, and before any portion of the said proposed Railway shall be open for public traffic, construct a good and sufficient branch or siding from such part of the said mill and premises as shall be required by writing, under the hand or hands of the said Henry Hawkes, his heirs or assigns, into the said proposed station, such writing to be left for the said Company at the office of their secretary for the time being; and shall and will, from time to time, and at all times thereafter, maintain or cause to be maintained, in good repair and condition, the rails, points, and other works belonging to such branch or siding, to the satisfaction of the said Henry Hawkes, his heirs or assigns; and shall and will, from time to time, and at all times thereafter, permit and suffer the said Henry Hawkes, his heirs or assigns, or other the person or persons for the time being entitled to the said mill and premises, to use and enjoy the said branch or siding, without impeachment or interruption, on his or their paying to the said Company such tolls or dues as may be duly authorised in that behalf; and, lastly, it is hereby agreed that the said Company, whether such bill as aforesaid shall pass into a law or not, or in any event, shall, within the space of one calendar month, pay to the said Henry Hawkes, his executors or administrators, his costs in relation to his opposition to the said bill, and to the treaty and arrangement with the said Company, and to these presents, not exceeding in the whole the sum of 30*l*."

This agreement was entered into between the parties under the following circumstances:—

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Mr. Hawkes, the father of the plaintiff, by his will, in 1836, devised his mansion and about six acres of land, near Spalding, in the county of Lincoln, (being the greater part of the property comprised in the said agreement), to the plaintiff for life, with remainders over to his children in strict settlement. The Railway Company, in 1847, were projecting a line of Railway from Wisbeach to Spalding, which, as shewn on the deposited plans, would pass on the border of the plaintiff's land; and the line denoting the limits of deviation would enable the Company to take about 1A. 3R. 30P., but not more of it, for the formation of the line. One of the objects of the defendants, the Eastern Counties Railway Company, was to form a junction with a projected extension line of the Ambergate, Nottingham, and Boston Railway, by means of a curvilinear extension line from the Wisbeach and Spalding Railway; and which, in order to effect this junction, must have crossed the Great Northern Railway, near Spalding, on the level.

Whilst the bill was before the House of Commons, the Great Northern Railway Company opposed the junction with the Ambergate line. The plaintiff also opposed the bill generally; and it being probable that the Great Northern Railway Company would succeed in their opposition to the proposed junction, the object of the agreement on the part of the promoters was, as was alleged and not denied, not only to induce the plaintiff to withdraw his opposition to the bill, but to enable the defendants, secretly, and without the assistance of Parliament, by means of a line diverging from the main line before it reached Spalding, and which would pass through the middle of the plaintiff's land, to effect a junction with the proposed Ambergate extension line without crossing the line of the Great Northern Railway.

There was nothing in the evidence or in the agreement to fix the plaintiff with knowledge of the secret purpose of the promoters.

The bill passed into an Act (10 & 11 Vict. c. ccxxxv.),

and received the Royal Assent on the 22nd of July, 1847; and by the 13th section it was enacted as follows:—“And whereas, on the plans deposited as aforesaid, a line of Railway is delineated, diverging out of the said intended Railway, and terminating by a junction with the Spalding branch of the Ambergate, Nottingham, and Boston Railway in the said parish of Spalding, be it enacted, that nothing in this Act contained shall be held or construed to authorise the Eastern Counties Railway Company to make the said Railway, or any part thereof, between the point of divergence from the Railway by this Act authorised, and the termination thereof at the said Spalding branch of the Ambergate, Nottingham, and Boston Railway.”

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The 14th section enabled the Company to purchase any quantity of land for extraordinary purposes connected with the said Railway, not exceeding thirty acres.

The 15th section enacted that the powers of the Company for the compulsory purchase of land should not be exercised after the expiration of three years from the passing of the Act. And the 16th section enacted, that, in case the Railways by the Act authorised should not be completed within five years from the passing of the Act, the powers granted to the Company for executing the Railways, or otherwise in relation thereto, should cease to be exercised, except as to so much of the Railways as should then be completed.

In consequence of the then state of the money market, the Eastern Counties Railway Company could not proceed with the formation of the proposed line; and the following correspondence ensued with reference to the foregoing agreement:—

On the 26th of November, 1848, the Company caused a letter to be sent to the plaintiff by a gentleman acting on their behalf, stating that he was authorised, on the part of the Eastern Counties Railway Company, to inform him that the Company were desirous of abandoning the Spald-

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ing line, or at least of postponing it for many years, if ever it were made; and at the same time inquiring whether the plaintiff would retain his estate on receiving compensation, and to what amount?

The plaintiff, in answer to this communication, by letter dated the 21st of the same month, stated that he declined to accede to the proposal, or to accept compensation.

The plaintiff's solicitors had forwarded his abstract of title to the solicitor of the defendants on the 24th of March, 1848; and on the 27th of December following they wrote, calling his attention to the time appointed by the contract for settling the purchase, viz. the 22nd of January then next, and informing him, that, if he did not take some steps towards the completion in a reasonable time, they should feel themselves called on to compel specific performance of the contract.

On the 18th of January, 1849, the plaintiff vacated the premises comprised in the contract; and on the same day the solicitors of the plaintiff again wrote to the solicitor of the Company as follows:—

“We regret to find that we are still without any communication from you relative to the completion of the purchase, which, by the agreement, ought to be completed on the 22nd instant, from which date Mr. Hawkes will expect, according to the terms of the contract, interest at the rate of 5*l.* per cent. per annum on 8000*l.* the purchase, and 5000*l.* the compensation money, until the same are paid, and this without prejudice to his remedies for enforcing the fulfilment of the contract. We beg also to give you notice, that Mr. Hawkes has vacated the premises, the subject of the contract, and that the Company will be at full liberty to take possession of the same on the 22nd instant, and you will consider this as a tender of possession accordingly; and that Mr. Hawkes will cease on that day to exercise any care or control over the property the subject of the contract; and that he is will-

ng and desirous on his part to complete the contract according to the terms of the same.

“P.S. The abstracts of title, which were forwarded to you on the 24th of March last, may be compared at any time with the deeds at our office.”

In answer to this, the solicitor of the defendants, on the 20th of the same month, wrote in the following terms: ‘A gentleman from my office will go down to Spalding on Tuesday, and attend at your office early on Wednesday morning next, for the purpose of examining the abstracts with the title deeds in your possession. I shall be glad to hear from you by return of post, that it will be convenient to you to produce them on that day.’

In answer to this communication, the solicitors of the plaintiff expressed their readiness to attend.

The solicitor of the defendants afterwards expressed his inability to attend on the day named, and asked for another appointment. In answer to which, the plaintiff’s solicitors then stated, that, after an interval of a week, during which they were engaged, they should be open to an appointment; at the same time they stated, “that Mr. Hawkes himself was with us yesterday to deliver up the keys, which he has left with us; he says, the premises will take great harm if they are not attended to, and that somebody should be put into possession.”

The 22nd of February was then fixed for examining the abstracts with the deeds, but no meeting took place; and after other correspondence on the part of the plaintiff, pressing the solicitor of the Company to proceed on the 22nd of February following, the solicitor of the defendants sent to Mr. Hawkes a notice, which was to the following effect:—That the Company did not require to take and use, and would not take and use, the whole or any part or portion of the plaintiff’s estate under their powers, and they required him to remain in the undisturbed possession and enjoyment of it; that the Company were not com-

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pellable to complete the contract, or to pay 8000*l.*; and that they abandoned it.

On the 10th of May following, the plaintiff's solicitor again wrote to the defendants' solicitor, forwarding a supplemental abstract of Mr. Hawkes' title to the part of the estate of which he was seised in fee simple, and saying that they had positive instructions to file a bill for compelling specific performance of the contract; which the intended to do forthwith, unless they received a satisfactory assurance that the Company would punctually perform the same without unnecessary delay. The Company acknowledged the receipt of this letter, but nothing further was done by them; and on the 10th of June, 1849, the plaintiff filed his bill, praying a decree for specific performance of the agreement of the 27th of May, 1847.

The defendants put in their answer to the bill, wherein they stated, that the Wisbeach and Spalding Act did not empower them to take or use the land of the plaintiff for the construction of their Railway. They also denied, that the plaintiff could contract for the sale of that portion of the land of which he was only tenant for life, or make a good title thereto. They also stated, that they had no funds to complete the purchase, no money having been raised under the Spalding and Wisbeach Act; and that they had given the plaintiff notice of the abandonment of the line before any suit had been instituted, and had offered, and were ready and willing, to pay for any damage he might have sustained by reason of the non-completion of the contract.

Affidavits were filed by the defendants, by which they deposed—that, the junction with the Ambergate line being refused by Parliament, they could not now make it; that the land of the plaintiff was not required for extraordinary purposes, and, being without the limits of deviation, they could not, under the powers of their Act, possess themselves of it; that the time for the completion

the Railway would expire in July, 1852, which would render it impossible to construct it under the powers of the Act; and that the Company had not in any manner interfered with the plaintiff's enjoyment of his mansion-house, garden, and premises, and had never entered upon or taken possession thereof.

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Mr. *Wigram* and Mr. *Follett*, for the plaintiff.

Mr. *Russell*, Mr. *Malins*, and Mr. *Grove*, for the defendants (a).

Knight Bruce, V. C., after commenting upon the dishonesty of the defence set up by the Company, and of their attempt to escape from the performance of a contract, made the following decree:—

That the contract be specifically performed and carried into execution; and that it be referred to the Master to inquire &c., whether a good title can be made to the messuage and hereditaments agreed to be sold by the agreement of May, 1847; and, if such good title can be made, then when it was first shewn. And in making such inquiry the Master is to have regard to the said contract, and particularly the clause therein contained, relating to the property which the plaintiff was therein mentioned to be tenant of in life under the will of his father, and to the provisions of the Lands Clauses Consolidation Act, 1845; with liberty to apply.

In pursuance of this decree the Master made his report, and thereby stated that a good title could be shewn, and that it was first shewn on the 10th of May, 1850.

The defendants took exceptions to the Master's report, but the material ones were the sixth and seventh. The sixth was as follows:—For that the plaintiff, H. Hawkes,

(a) The arguments of counsel are given, *infra*, pp. 199 et seq., before the Lord Chancellor.

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claiming to be only tenant for life of the greater part of the property, is not empowered to sell and convey, and the Company are not empowered to purchase and take, such part of the property as is not shewn on the deposited plan of the Railway, nor described in the books of reference to such plan, the special Act and the Lands Clauses Consolidation Act not being applicable to land which is not so shewn and described; and, the whole property being comprised in one contract, the same cannot therefore be performed. Seventh—For that the powers of the Company to purchase and take land are not and have never been in force, inasmuch as the capital proposed to be raised by the Wisbeach and Spalding special Act has not been subscribed for.

1851.

March 14th.

Mr. Russell, Mr. Malins, and Mr. Grove, in support of the exceptions, contended, that the purchase of the plaintiff's land was matter of contract, and did not come within the powers of the Lands Clauses Consolidation Act. That the forms prescribed by that Act had not been complied with. That no valuation had been made by a competent surveyor; and that the greater part of the plaintiff's lands, being without the limits of deviation, were quite independent of and could not be touched under the powers of the Act. That the purchase money was one entire sum, and could not be divided or apportioned, or paid into Court, so as to comply with the provisions of the Act referred to.

[The VICE-CHANCELLOR, in the course of the argument, asked the counsel for the defendants whether they then wished a valuation in conformity with the 9th section of the Lands Clauses Consolidation Act; but they declined the offer.]

Mr. Wigram and Mr. Follett, for the report.

Mr. Russell replied.

The VICE-CHANCELLOR overruled the exceptions; and a decree in the following form was eventually drawn up:

Refer it to the Master to compute interest on the sums of 8000*l.* and 5000*l.* from the 22nd of January, 1845, the date of the passing of the Act: And the plaintiff submitting to have the whole of the said sums of 8000*l.* and 5000*l.*, mentioned in the agreement, paid into Court, as if the same were purchase-money arising from estates devised to the uses of the will of H. Hawkes the father; And the defendants declining to make any election, or to express any wish as to the account to which or in what manner the said monies should be paid; And the defendants not requiring or desiring that a valuation of the hereditaments by a surveyor should be made in the manner prescribed by the 9th section of the Lands Clauses Consolidation Act, 1845, or otherwise; Upon the plaintiff executing a proper conveyance &c., ORDERED, that the defendants, the Eastern Counties Railway Company, should pay the sums of 8000*l.* and 5000*l.* into the Bank to the credit of the cause, subject to the further order of the Court. The defendants to be at liberty to make any application with reference to such purchase money. [And then followed the usual directions for taxation and payment of costs, and for taking an account of the rents and profits of the plaintiff's property since the passing of the Act.]

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The defendants appealed from the decree on the hearing, and also from the decree overruling the exceptions to the Master's report (a).

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The *Solicitor-General* (Sir *F. Kelly*), Mr. *Wigram*, and Mr. *Follett*, for the plaintiff, in support of the decree of the Vice-Chancellor.—It was contended, in the Court below, that the agreement in the present case was ultra vires; and that it would be a misapplication of the Company's funds if they now attempted to perform their agreement; and they cited various cases in support of this position;

(a) The appeal was argued at great length before the late Lord Chancellor (Lord *Truro*) on the 11th, 14th, and 18th of November, 1852; but he resigned the Great Seal without giving judgment;

and, an offer by his Lordship to deliver judgment after such resignation having been refused by the defendants, the appeal came on to be heard before the late Lord Chancellor (Lord *St. Leonard's*).

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but those cases do not apply in the present instance, for this agreement was made conditionally, on the legislature sanctioning the formation of the Railway by the Eastern Counties Railway Company, which in fact gave them the very powers they now repudiate. It is true, that, before the passing of the Wisbeach and Spalding Railway Act (10 & 11 Vict. c. ccxxxv.), the objections stated to the specific performance of this agreement would have prevailed; but as soon as that Act passed, which blended the funds and the undertaking with those of the Eastern Counties Railway Company, the whole of those objections were removed. The cases of *Simpson v. Lord Howden* (a), *Stanley v. The Chester and Birkenhead Railway Company* (b), *Edwards v. The Grand Junction Railway Company* (c), *Lord Petre v. The Eastern Counties Railway Company* (d), all shew that agreements entered into by the promoters of a projected Company, and made dependent on an Act of Parliament being obtained, can be enforced against the Company when incorporated, if they have had any part of the benefit which they stipulated for. In the present case the Company have benefited by the withdrawal of the plaintiff's opposition to the bill. It has also been contended, that, the plaintiff being tenant in fee-simple of a part of the property agreed to be sold, and tenant for life only of the remainder, he cannot make a good title of that part of which he is only tenant for life; but the 7th section of the Lands Clauses Consolidation Act gives tenants for life powers to contract. It is said, indeed, on the other side, that a part of the property is without the limits of devolution, and is not touched by the provisions of the Act; and that the Act only applies to such lands as the Company are authorised to take compulsorily. But, if this be so, the Company have then power under the same Act (sect

(a) Ante, Vol. 1, p. 347.

(b) Id. p. 58.

(c) Ante, Vol. 1, p. 173.

(d) Id., p. 462.

45) to purchase lands for extraordinary purposes. The Company therefore have power to take the land; but, whether they have or not, they are bound to perform the contract: *Duke v. Barnett* (a). If there is any hardship in compelling the Company to take the land when it happens afterwards not to be required for the purposes originally intended, they have inflicted that hardship on themselves, and the plaintiff is no party to it. They undertook to acquire all necessary powers, and it is their own laches if they have not done so. The cases of *Webb v. The Portsmouth Railway Company* (b), and *Lord J. Stuart v. The London and North Western Railway Company* (c), were cases decided on their own merits. In these the plaintiffs forfeited their relief by reason of inherent defects in the contract, want of mutuality, laches, and uncertainty; but, in the present case, no such special grounds exist for withholding the relief sought by the bill. It cannot be alleged that there is want of mutuality, for the Railway Company could at any time have filed their bill for specific performance. There has been no laches, for the suit was instituted before the time given for the formation of the Railway had expired; and there was no uncertainty, for the quantity of land and the price to be given were accurately defined.

Mr. Bethell, Mr. J. Russell, Mr. Malins, and Mr. Grove, in support of the appeal.—The grounds on which specific performance cannot be decreed in this suit are two: first, that the contract is illegal, and therefore invalid, and that it is incapable of having effect given to it at law or in equity; secondly, that, if the agreement is legal, it is impossible under the special circumstances of the case to make a decree for specific performance. As to the illegality of the contract, it has been decided, and it is a well-known principle, that public Companies can only apply their funds for

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(a) 2 Coll. 337.

(b) Ante, p. 9.

(c) Ante, p. 25.

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the specific purposes authorised by their Acts. Now, in this case, the attempt of the Railway Company is to effect, by a private agreement, what the Legislature has, by special words inserted in an Act of Parliament, refused. It is no part of the parliamentary plan, to effect a junction with the Ambergate line by means of the diverging Railway through the plaintiff's land. The Company have no power to take his land, except only a very small piece which lies within the limits of deviation. The Company, having abandoned the undertaking, cannot want the plaintiff's land for extraordinary purposes; and, therefore, the argument, that the Company have power to take it under the 45th section of the Lands Clauses Consolidation Act entirely fails. The plaintiff must have been well aware of the powers of the Company with whom he was dealing and he should have satisfied himself that they were not exceeding those powers: *M'Gregor v. Official Manager of the Dover and Deal Railway Company* (a). The Company have no funds wherewith to complete the purchase; they have raised no money under the Wisbeach and Spalding Extension Act, and the funds of the Eastern Counties Railway Company cannot be applied for the purchase of lands or the completion of contracts made with reference to lands which will never be required for the parliamentary line at all: *The East Anglian Railway Company v. The Eastern Counties Railway Company* (b). The defendants are only the promoters of the extension line; they are a Company and have no individual existence, nor any funds which are not dedicated to certain and definite purposes: *Colman v. The Eastern Counties Railway* (c), *Bagshawe v. The Eastern Union Railway* (d).

The cases of *Webb v. The Direct London and Portsmouth Railway Company* (e), and *Lord James Stuart v. The London*

(a) 22 L. J., Q. B., 69.

(b) 21 L. J., C. P., 23.

(c) Ante, Vol. 4, p. 513.

(d) Ante, Vol. 6, p. 152.

(e) Ante, p. 9.

don and North Western Railway Company (a), as decided by the Lords Justices, and *Harnett v. Yielding* (b), are strong authorities, to shew that the Court will not look upon these contracts in the same way as those existing between individuals. In cases of public Companies, it is against the policy of the law, that they should by any means become the possessors of land, except for certain purposes. If the Railway is constructed, they are obliged to sell all surplus land; and they cannot hold a single acre not required for the purposes of the Railway. How then can it be alleged, that the Company require or have a right to take a single acre of the plaintiff's land? Could they compel specific performance of the contract on their part? How then could there be any mutuality? In all cases of specific performance, the very ground of equity on which they rest is mutuality. The plaintiff also is tenant for life only of part of the property contracted to be sold, and it is so stated on the face of the contract. Now, although the Company may deal with tenants for life in a certain manner, and by following the forms prescribed by the Lands Clauses Consolidation Act, they cannot contract independently of the Act with incapacitated persons. The stipulation, that they are to acquire powers, will not enable them; that must be read as if the agreement had said, that, if the Company acquired the power, they should take the land, but they have not done so. They cannot be compelled to go to Parliament, or to take extraordinary means for acquiring powers. [The *Lord Chancellor* observed, that, if a tenant for life contracted to apply for an Act of Parliament to enable him to sell this land, the Court would interfere to compel him.]

There is a distinction between a contract entered into by the promoters of a projected Railway scheme and one to which an incorporated Company is a party. In the

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(a) Ante, p. 25.

(b) 2 Sch. & Lef. 249.

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first case, there is a deposit required, and the sum subscribed is applicable to contracts; but in the case of corporate Companies, who make no deposit, there is no power to bind the funds and capital of the Company, which are devoted to specific purposes.

The *Solicitor-General* in reply.—There is no evidence whatever, and nothing in the contract itself, to fix the plaintiff with knowledge of the alleged illegal object of the contract. The recital in the agreement must be taken to represent the true consideration; and the plaintiff was not bound to know or inquire into the powers of the contracting parties. But even if he was bound, the contract was conditional on the Act passing; and that Act having passed, the contract became legal and absolute, and the Company were enabled to fulfil it. The 4th and 5th sections (a) of the Company's Act empowered the Company to raise funds which then became mixed with and formed part of their assets. If they did not raise the capital, they had but themselves to blame for not doing so. The Company, having by their own acts deprived themselves of the benefit of the contract, now seek to repudiate it; but the Court will never permit parties to set up their own delay, or their own wrong, as a valid or successful reason for not compelling them to fulfil their engagements.

(a) Sect. 4. "That it shall be lawful for the said Company to raise, for the purposes of the said Railway, the sum of 250,000*l.*, by the creation of new shares or stock, in addition to any sums which they are already authorised to raise, upon such terms generally and in such manner as may be or may have been agreed upon at any general meeting or meetings of the Company specially

convened for that purpose, or in such manner as may be or may have been agreed upon between the several persons who have subscribed towards the undertaking hereby authorised, and the said Company or the directors thereof for the time being."

Sect. 5. "That the new shares to be created by virtue of this Act shall be considered part of the general capital of the Com-

The LORD CHANCELLOR (*a*).—In this case, a question arises whether this Court will or not enforce the specific performance of an agreement entered into, during the progress of a bill in Parliament, by the owner of land on the line of a projected Railway for the sale of part of his property.

The bill, as it was originally passed, enabled the Eastern Counties Company to make a Railway from Wisbeach to Ely, according to certain plans which had been deposited in the usual manner with reference to the line. A portion of the line, however, delineated on the plans, was rejected by Parliament to be rejected, and the 13th section was expressly inserted for that purpose. [His Lordship, after reading the 13th section, ante, p. 193, and adverting to the powers of the Company to buy land, not exceeding thirty acres, for extraordinary purposes, and to the compulsory powers of the Act, which were to continue for three years, and also to the five years allowed for the completion of the works, proceeded as follows:—]—Whilst the bill was in Parliament, and before that particular portion of the line which I have adverted, and to which the Act of Parliament by the 13th section refers, had been rejected by Parliament, an agreement was entered into between the Company of the one part, and Mr. Hawkes of the other part;—and here it must be remarked, that this was a Company formed and regularly established for Railway purposes to a great extent, but intending by this bill to extend their Railway, and not as we often see projectors or committees entering into contracts before they have obtained corporate existence and powers.—[His Lordship then read the agreement, ante, p. 188.] The Company, in short, purchased of Mr. Hawkes this property

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y, and as such shall be subject to all the provisions of the several recited Acts relating to such capital, except in so far as such provisions or any of them

may be inconsistent with the provisions of this Act, or the terms upon which such new shares shall have been created as aforesaid.

(*a*) Lord St. Leonard's.

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for a given sum, and agreed to give a certain number of thousands of pounds as a compensation for the damage which had been done to him, and for the inconvenience of removing his business—I suppose he carried on business at the mill, which is referred to at the end of the agreement. And then it was recited, on which something has turned in this discussion, that Mr. Hawkes was the owner of the mill adjoining the proposed station of the Ambergate, Nottingham and Boston, and Eastern Junction Railway at Spalding. It had been arranged, as part of the terms, that the Company should enter into another agreement; and they did, in fact, enter into an agreement that they would, before they opened the other line to the public, make a siding from his mill to the intended station.

Now, the main line itself goes through a part, amounting to nearly two acres, of this particular property of Mr. Hawkes—at least, it might go through that property which is clearly, to that extent, within the powers of the Act of Parliament which actually passed. The deviation that is marked by the curvilinear diverging line upon the plan originally deposited would also have gone so as to take in within its deviation a still larger portion, as I understand it, of Mr. Hawkes's property; but whether the original line was adhered to without the curvilinear diverging line, or whether they were both retained, in either case this property was within the powers of the Act of Parliament, and might be affected by the exercise of those powers.

Well, Parliament thought fit to reject so much of that curvilinear diverging line as would have enabled the Eastern Counties Company to cross the Great Northern Railway; it was thought dangerous, I suppose, to do so; and also, for other reasons, which I need not enter into, that was rejected. However, the Eastern Counties Railway Company had it, it seems, in contemplation, although no such thing as I am aware of, was mentioned to Parliament—it was

ated on one side and not denied on the other, though
 o such allegation is set up by the answer—at a certain
 oint to continue the extension line to a certain other
 oint on the Ambergate Railway, so that the Eastern
 ounties Railway Company would have thus been enabled,
 effect, to get to the point they wished, contrary, it is
 id, to the intention of the Act of Parliament; and they
 ould have effected this by going through Mr. Hawkes's
 roperty; and therefore the purchase of Mr. Hawkes's
 roperty would have enabled the Eastern Counties Rail-
 ay Company indirectly to do that which the Act of Par-
 ament intended to prevent them from having a direct
 ower to accomplish.

Now, this agreement, it will be observed, contains not
 he slightest reference to any such intention. It cannot
 e collected from the latter part of the agreement relating
 o the mill, that there was any such intention; because,
 ooking at the position of the mill, it is perfectly clear,
 hat although what is called the red line, which was pro-
 posed (it is said) to join the Ambergate line, might have
 ome effect on this, yet, looking at it, it is quite clear that
 he red line had never been formed at all: but still, if the
 Ambergate line had been brought down to the point in-
 ended, this gentleman would have been entitled to have
 siding made from his mill to the proposed station. I
 an see nothing, upon this part of the agreement, which
 an affect this question, even if the general principle could
 affect it.

Then it appears, that a correspondence ensued between
 he parties, which is in evidence, and which shews, at
 east, the grounds which were resorted to in order to get
 id of this agreement. The result was, that Mr. Hawkes's
 olicitors gave a notice to the Company's solicitor that
 Mr. Hawkes had, on the 18th January, 1849, vacated the
 remises, the subject of the contract; and that the Com-
 any had full liberty to enter upon the property. Nobody

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can find fault with Mr. Hawkes for going out of possession. He was bound to deliver up possession to the Company, and bound to provide himself—indeed, he was under the necessity of providing himself—with another residence. It cannot be expected that a man is to wait till the moment he is turned out, and then to seek for a new habitation. [His Lordship then referred to the facts, and read the correspondence which ensued upon the delivery of the abstracts, and particularly read “the important letter of the 20th January, 1849,” ante, p. 195, wherein the solicitor of the Company appointed a meeting for the examination of the title deeds.]

The question arising in this case is, whether or not the plaintiff is entitled to a decree for specific performance. It was not from any doubt that I entertained on the case during the argument that I postponed disposing of it; but it was on account of the very important questions of law which were very ably argued before me, and which, I thought, required consideration before I disposed of the case. It does not, however, appear to me that any of those questions are really involved in the decision of this, which I consider to be a plain case.

This is a case in which there is a Company formed, and undoubtedly competent to bind themselves within their powers; it is a corporation capable of entering into a binding contract. The property which was to be disposed of by Mr. Hawkes was property, a sufficient portion of which was directly to be affected by the bill as it stood at the time the agreement was entered into, to give jurisdiction to this Court; at all events, his property was made liable, and remained liable, to the powers of the Act of Parliament, which would have enabled the Company, if not to go through the plaintiff's house, at all events generally to affect it.

It seems, therefore, unless there are grounds in point of law, ridiculous to say, that, if a party capable of en-

tering into a contract with reference to a subject before Parliament does enter into that contract, and Parliament gives powers which would enable the party to enforce it, that party can, by neglecting to exercise his powers, free himself from the obligation of performing the agreement which he has entered into, whether it be because he has allowed his powers to lapse and can no longer exercise them, or because he will, in order to perform his engagement, be compelled to do an act which he now thinks fit to say, he deems illegal.

On principle, I should not have had a moment's hesitation in saying that this was a plain case for specific performance; and the authorities, speaking generally, up to a very late time, admit of no doubt. In the case which was referred to, of *Stanley v. The Chester and Birkenhead Railway Company* (a), the agreement was held to be binding, the not opposing of the bill being held to be, as I think it was, a good consideration. In that case the land was not wanted; and although in this the land is not wanted, yet the agreement not to oppose placed the landowner in a situation to enforce his contract. Then, in the case of *Edwards v. The Grand Junction Railway Company* (b), certain clauses restricting the powers of the Company, though not introduced into the Act of Parliament, were left to operate under the agreement alone; yet there the agreement was held to be valid, and the corporation was held to be bound by the act of the agent of the projectors—a difficulty which we have not to contend with here, because we are in this case dealing with the Company itself, which has executed his agreement under its seal.

Then comes the case of *Simpson v. Lord Howden* (c), in which the agreement was entered into by projectors; and although the line was abandoned, yet the contract was enforced. A great question was raised there, as it was in the

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(a) Ante, Vol. 1, p. 58.

(b) Id., p. 173.

(c) Id., p. 347.

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subsequent case of *Lord Petre v. The Eastern Counties Railway Company* (a), whether Lord Howden, who was a peer of Parliament, could properly enter into an agreement behind the back of Parliament, if I may use the expression—out of the House—by which he agreed to give up his opposition to the measure in the House. It was held, that, as there was no pretence for imputing any attempt at improper conduct on the part of that noble lord, such conduct could not be inferred; that a peer had as much right to enter into a contract with reference to his property as if he had not been a member of that House. Now, *Lord Petre's case* was, perhaps, a still stronger one; not only was he a member of the House, but the agreement was entered into with him by a committee of management on behalf of the promoters, and that was held binding upon the corporation; but, notwithstanding the extravagance of the sum, for the consideration paid was enormous, it was held not to be illegal; neither was the excuse of hardship arising from the circumstance of the expiration of the time for taking the land allowed to prevail.

Upon the whole, therefore, the cases establish, without the slightest doubt in my mind, that an agreement of this sort, a bonâ fide agreement, not evading the Act of Parliament, but enabling the Company to assist its views and carry the Act of Parliament into effect, whether for a smaller or larger consideration, is perfectly valid. I have no means of measuring the value, nor is there the slightest evidence of what the value of the plaintiff's property was, or whether the Company were paying too much or too little for it. I should have thought such evidence unimportant, and therefore I am not finding fault with its not being mentioned. I only take it for granted, that, not being mentioned, it was thought unnecessary; but in many of these cases it is of the greatest

(a) Ante, Vol. 1, p. 462.

importance to the Company that they should be enabled to make purchases during the pendency of the bill, and before the bill passes, because it clears the ground for them; they take that which they want, and they pay a little more for it. There is no extortion, and it is not for this Court to inquire into that.

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Several grounds were raised even upon these authorities. First of all, it was said that there was a great hardship upon the shareholders. Now, in 1 Railw. Cas. 199, you will see the subject of the hardship of the shareholders dealt with, where the Court says, very properly, that you cannot sever the shareholders from the general body; but they must of course share the fate of a part of the body. It is said there by the Court, (p. 199), "It was contended for the Railway Company, that, to enforce this, would be injustice to the shareholders of the Company, who had no notice of such an arrangement. To which two obvious answers can be given: first, that the Court cannot recognise the rights of individuals interested in the corporation, but must look to the rights and liabilities of the corporation itself." That is an answer, which I think a very sufficient one. Well, then, it is said that there is illegality in the concealment of this from Parliament; the answer to which will be found in *Lord Howden's case*. There is in that case this passage, which I will read first, (p. 369)—"It is, indeed, alleged in the plea, that the agreement was secret, and was kept secret; but it was quite consistent with every averment in the plea, that both parties may be innocent of any original fraudulent understanding that the transaction should be kept secret at the time the deed was executed. As the instrument is not, upon the face of it, fraudulent—as no intention of making any false representation, or of concealing anything, can be collected from any part of it, the facts which make it fraudulent ought to be distinctly alleged; and no such facts are alleged. The subsequent concealment from the legislature might, indeed,

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have been used as evidence to the jury of the prior intent to conceal, if that intent had been averred; but such subsequent concealment would be evidence only, and would by no means be conclusive evidence: it cannot be used to supply the want of such distinct averment."

Now here there is no such statement of any sort or kind. There is nothing here upon the face of the pleadings to shew that there was any intention whatever to conceal from Parliament the transaction between the Company and the plaintiff; nor is there any reason indeed why there should be. I will presently refer more particularly to that point. Then it is said, that there is great hardship where the time has expired: that does not properly apply to this case, because when this bill was filed the time had not expired, and sufficient time remained to complete the works, even after the bill had been filed. The whole fault here is upon the part of the Company. Mr. Hawkes has never been guilty of any neglect—he never swerved from his readiness to perform his contract; but the defendants have from the beginning to the end acted, in regard to this transaction, with as much bad faith as I ever witnessed on the part of any public body.

In *Lord Petre v. The Eastern Counties Railway Company*, the question of hardship arising from the expiration of the Company's powers is dealt with by the Lord Chancellor, who says (a), "The hardship complained of is the expiration of the parliamentary time; but, as I understand the case, the Company have brought that hardship upon themselves." That is exactly the observation which I should make in this case; therefore, I think all these difficulties are removed.

It was said that part of this agreement consists of an obligation, on the part of the Company, that they will try to obtain power in order to carry the contract into effect, inasmuch as the plaintiff was entitled to a por-

(a) Ante, Vol. 1, p. 479.

On appeal I am asked to treat this contract as a
—that is, to hold that all contracts which parties
to not having themselves the power to carry them
out, and therefore agree to apply to Parliament to
obtain such power, are so utterly void, that this Court
must even protect the property until an opportunity
has been afforded for an application to Parliament.
The effect of such a decision would be to nullify very many
arrangements entered into, and many with the sanc-
tion of this Court, but to give effect to which the powers
of Parliament are indispensable. It would also nullify all
acts by projectors of Companies before an Act was
passed; but it is now nearly twelve years since, in *Ed-
wards v. The Grand Junction Railway Company* (b), I gave
advice against the incorporated body, to a contract en-
tered into by the projectors of it before the Act was passed,
in contemplation of its passing—that is, a contract
which the parties at the time had no power to carry into
effect but proposed to do so by the authority of Parlia-
ment and there are now many cases to the same effect.”
Therefore, disposed, to my mind quite satisfactorily,
of their objections.

Independently of these general questions which I have
just decided, it was insisted here, that, subsequently to the
decision in the Court below, the cases upon which the

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after the decision in this case was made, the Court having relied on that case, that decision was reversed. Now, it appears to me that that case was reversed upon the uncertainty of the contract: and if it was reversed upon any grounds of supposed illegality, I should have had great difficulty in acceding to the doctrine, that a Company, entering into such a contract as this is, could upon any such grounds get rid of the contract.

If, as in some of these cases, several of which have been cited, the contract is so worded that it really depends upon this, that the Company are not to pay unless they require the land—that is, they are to pay when they take the land, which assumes that they are not to pay unless they do take the land—that may fairly be considered a conditional contract. I have nothing to say to such cases: but where, as in this case, it is an absolute and unqualified contract to take the land, I should certainly hold that no subsequent accident, certainly no subsequent conduct on the part of the Company, could relieve them from the obligation by which they were bound at the time they entered into it. At the time of the Act of Parliament passing, the contract was perfectly good. It contemplated the passing of the Act, and the Act did pass, exactly in the terms pointed out in the agreement. Well, then, so far it was a valid contract. It was observed in argument, very properly, “supposing this agreement had been entered into after the passing of the Act, would any man at the bar say that was a contract not to be executed?” If it was to be executed, why should it not be valid before the Act passed?

Looking at the authorities which have concluded that question, why should it not be as binding being entered into before the Act passed, as it must be admitted it would have been if executed immediately after the Act had passed? There is no magic in these things. The good faith, the truth, and the honesty of the transaction, are to be looked at—there is no rule of law in it. If, there

re, *Webb v. The Direct London and Portsmouth Railway Company* is considered to decide anything adverse to my view of the present case, I cannot, so far as my authority goes, with great deference to others, support it; but I apprehend that case turned on the uncertainty of the contract. In *Lord James Stuart v. The North-Western Railway Company (a)*, the Master of the Rolls decreed a specific performance, upon the authority of *Webb v. The Direct London and Portsmouth Railway Company* before it was reversed. It was said, that the reversal of that judgment therefore displaced his authority. That also was reversed.

In that case there were two questions: first, a question whether there was any concluded agreement—any binding agreement—anything amounting to a positive contract; and next, there was great delay. Those cases were relied on. I do not say that either of those cases was not properly decided; I am not called upon to say that; but I say, that, if they are to be considered as opposed to specific performance in a case like this before me, I could totally disagree with them. It is a new view of the doctrine of this Court, and it is a view which could not be supported consistently with the many authorities which exist on this subject.

Then it was argued with great force, and insisted upon, that the contract is illegal, because the Company are applying the funds to purposes not authorised by the Act of Parliament; and in support of that argument several cases were cited—*M'Gregor v. The Dover and Deal Railway Company (b)*, *The East Anglian Railway Company v. The Eastern Counties Railway Company (c)*, and *Waghorne v. The Eastern Union Railway Company (d)*. Those were all cases in which the Company were really acting beyond their powers. One cannot but grieve to

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(a) Ante, p. 25.

(b) 19 L. T. 316.

(c) Ante, p. 150.

(d) Ante, Vol. 6, p. 152.

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see great Companies like these, with enormous capital, with a full knowledge of all their powers, and with legal advice constantly at their command, entering into an agreement, and then turning round upon the party with whom they have contracted, and endeavouring to evade the contract upon the ground that it is beyond their powers, and absolutely illegal on the face of it. One cannot but regret that Companies should resort to so unseemly a defence in Courts of justice. I do trust that we shall not hear of many more of these cases; but that these Companies will take care, that, in entering into contracts with individuals who are not so well protected, they will not go beyond their powers; for one cannot but feel that they enter into such contracts, if they be illegal, with perfect knowledge of their illegality. Nothing can be more indecent than for a great Company to come into a Court of justice, and to say that a solemn contract which they have entered into is void, not from any subsequent accident, not from any mistake or misapprehension, but on the ground of its not being within their powers, that is, because they thought fit to enter into it, meaning to have the benefit of it if it turned out for their benefit, and to take advantage of the illegality in case the contract should prove onerous and they should desire to get rid of it. Such highly dishonourable conduct I trust we shall not often see in Courts of justice.

It may not be proper for me to find fault with the cases to which I have been referred. They are cases in which it appears the Company did enter into engagements clearly beyond their powers, and the parties contracting with them might be supposed to have known it. It has been decided that they cannot be enforced, and I have nothing to say against those decisions; but this case does not fall within them. Nothing has been stated to me in support of this alleged illegality, excepting this—that Mr. Duncan, in part of his evidence, refers to the intention of the Company to

form a junction with the proposed Ambergate line, and for that purpose to go through the plaintiff's property, they being unable to get at the point which they proposed to reach by reason of the curvilinear diverging line having been rejected by Parliament. This they say is a fraud on Parliament. There is nothing of this in the contract or in the answer. This Court does not permit evidence to be given on a point of defence not raised in the answer, because, if raised, the defendant might have shewn there was no foundation for it. I believe there is no foundation. I believe that the Company had in view that they might, by this short cut through Mr. Hawkes's property, get to a certain point; but Mr. Hawkes had nothing to do with that. The Act provides for taking this property for the very purposes authorised by Parliament itself. The cases, therefore, do not touch this question at all, and consequently I am not embarrassed by their authority.

Then it is said, there is no mutuality, and therefore that the Company could not enforce it, because they have no means of carrying it out. That involves also the question of the expiration of the time. I have already referred to authorities to shew that expiration of time in a case of this sort amounts to nothing, where, as in this case, it is the fault of the Company itself that the time has been allowed to expire. They have thought proper to allow the time to expire. Their conduct, upon this correspondence admits of no excuse. With full knowledge of all they intended to do, they are told the deeds are ready to be examined with the abstracts; they make an appointment to go down,—without raising a word of complaint,—to examine the abstracts with the deeds. They break that appointment, and make no other. They are told the vendor has vacated the possession of the property, and that it is at their disposal; and that he has sought another residence, as he must necessarily have done; and then they serve a formal notice, telling him they will

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have nothing to do with the contract—that they do not want the property, and do not mean to make the line. What has mutuality to do with it? There are many cases where the Court has not looked to the doctrine of mutuality as it ought to have done under ordinary circumstances, and has enforced a contract against a party where that party could not have enforced the contract against the other side. I must look at this contract at the time it was entered into, and at the time the Act of Parliament passed. Was there then any want of mutuality? Could not the Company, within an hour after the Act passed, have enforced the contract against Mr. Hawkes? Nobody disputes or doubts it. Want of mutuality may be urged, not where a man subsequently to the contract chooses to introduce impediments to the performance of the contract on his own part, but, where it is impossible for him to do that which he had contracted for; but even then he cannot turn round against the man with whom he has contracted, and throw upon that man the loss. Who is to bear the loss in this case? The Company say the loss is to fall upon Mr. Hawkes. Who is to blame? The Company—not Mr. Hawkes. The Company, therefore, in endeavouring to repudiate their solemn contract, having broken this agreement in consequence of their own act, throwing up the line after they had obtained authority to make it, modestly desire that the whole loss and burthen should be thrown on the parties who are not to blame. Fortunately, the law, the justice, and the equity of this case concur. There is nothing to prevent my enforcing the contract.

Then certain other cases were cited, as shewing I ought not to interfere to enforce performance of the contract: *Gage v. The Newmarket Railway Company* (a) was one. That seems also to turn on the agreement being conditional.

(a) Ante, p. 168.

The agreement there was, that the Company, before they entered on the land which they might require, should pay, and it was considered that there was no absolute agreement to pay. No doubt the Lord Chief Justice said, if there had been a covenant to pay, or a covenant to pay a sum as a sum in gross, that the Court would have treated it as void. That case was not before the Court; but they evidently considered it within the other cases, where they had held that the Company could not bind itself beyond its powers. It requires great consideration how far that doctrine should be carried. I dare say it will be necessary that it should be ultimately carried elsewhere before it can be finally decided. It is a great and serious question how far these Companies can be allowed to enter into contracts solemnly under their seal, and then turn round upon the parties and say they have exceeded their powers, and consequently refuse to perform their contracts. In the other case of *Gooday v. The Colchester and Stour Valley Railway Company* (a), there was no agreement binding upon the Company.

I can find no authority, and I have looked carefully through every case which has been cited, and I postponed disposing of the case in order that I might have that opportunity, to shake the opinion I entertained when the argument was closed, that this is a very clear case for specific performance. I am very glad that the law turns out to be consistent with the equity of the case; and therefore I dismiss this appeal, and with costs.

The *Solicitor-General* asked that the costs of the appeal before Lord *Truro* might be included in the costs, the Company having refused to accept Lord *Truro's* judgment.

(a) Not yet reported: M. R. April 30th, 1851.

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THE LORD CHANCELLOR.—Strictly, they had a right to do so. I decline to make any special order as to those costs.

On this day the appeal against the *Vice Chancellor's* order, overruling the exceptions to the title (a), came on to be heard.

THE LORD CHANCELLOR.—There is nothing in the contract or in the negotiation, as appears in the correspondence, to shew that the defendants had any doubts of their capacity to purchase; and there is no evidence produced to shew that the whole of the land might not be legally taken for extraordinary purposes. As to the omission to make the valuation between the tenant for life and the remainderman, that duty entirely devolved on the Company, who cannot be permitted to set up their own neglect as an argument for not fulfilling the contract. There is nothing to prevent that valuation and apportionment now.

This appeal must also be dismissed with costs.

(a) Ante, p. 199.

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CATCHPOLE v. THE AMBERGATE, NOTTINGHAM AND BOSTON, *Nov. 20th.*
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CASE.—The first count stated, that, at the time of the execution of the deed of transfer hereinafter mentioned, one N. appeared in a certain book of the defendants, kept by them in pursuance of the Companies Clauses Consolidation Act, called the "Register of Shareholders," to be, and then was, the holder and proprietor of 300 shares in the undertaking of the defendants, of the value of 2000*l.*, and was entitled to sell and transfer the same, and, being desirous to sell and transfer the said shares to the plaintiff, agreed with the plaintiff to sell them to him, and then sold to the plaintiff the same for 37*l.*; and thereupon, by a certain deed duly stamped, and signed, sealed, and delivered by him and the plaintiff, N. did transfer the said shares to the plaintiff, to hold the same to the plaintiff, his exe-

A declaration in case against a Railway Company stated, that N. appeared on the Register of Shareholders of the defendants to be and was owner of 300 shares in their undertaking; that the plaintiff bought the shares of N., who, by a deed, transferred the same to him, subject to the conditions on which N. held them; and that the plaintiff afterwards caused

the same to be delivered to the secretary of the defendants, in order that the defendants might enter memorial on the register of transfers, and indorse such entry on the deed of transfer, and might demand deliver a new certificate to the plaintiff as the purchaser of the shares; yet the defendants did not, nor did any other person, enter any such memorial, or indorse any entry; whereby the plaintiff had been deprived of his right and title to appear on the books of the defendants as holder and proprietor of the shares; and by reason of N. still appearing by the register to be the holder of the shares, and of calls having been made by the defendants upon persons so appearing by the last-mentioned book to be holders and proprietors of the said shares, and (among others) upon N., and by reason of the failure of N. to pay the calls, the defendants declared the shares forfeited; such forfeiture having been afterwards confirmed at a general meeting of the Company, and the shares so forfeited directed to be sold for the purpose in the last-mentioned Act declared, and according to the provisions thereof, the shares were sold by the defendants, and the plaintiff had there- been deprived of his right to compel the defendants to make such entry and indorsement as aforesaid, and to deliver to the plaintiff such certificate, and had also been deprived of the shares and all benefit thereof, and all the dividends and other profits which he might have derived therefrom, and also of the benefit of selling the shares at an increased premium, the shares having since risen in value.

The second count stated, that the plaintiff was the lawful holder of, and well entitled to, 300 shares in the undertaking of the defendants; that the defendants, without lawful cause, and in pretended exercise of the powers conferred by the Companies Clauses Consolidation Act, 1845, wrongfully declared the shares forfeited, and afterwards confirmed such forfeiture, and sold the same, whereby the plaintiff had been deprived of the said shares and the benefit thereof:—*Held*, on special demurrer, that both counts were good.

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cutors, administrators, and assigns, subject to the several conditions on which N. held the same at the time of the execution thereof; and by the said deed the plaintiff agreed to take the said shares, subject to the said conditions: that, in the deed, the consideration for transfer was truly stated; and that the deed was in all respects according to the form in schedule B. to the last-mentioned act of Parliament annexed, or to the like effect; that the plaintiff caused the same to be delivered to the defendants, to wit, to one G., then being the secretary of and appointed by the defendants, as their agent in that behalf, to be kept by them, and in order that the defendants might enter a memorial in a certain book of the defendants, kept by them in pursuance of the provisions of the last-mentioned Act of Parliament, called the "Register of Transfers," and indorse such entry on the said deed of transfer, and might, on demand, deliver a new certificate to the plaintiff, as the purchaser of the said shares, according to the said Act of Parliament; and it then became and was the duty of the defendants to make and indorse such entry as aforesaid; yet the defendants did not, nor did the said G. as such secretary, or any other person on the defendants' behalf, enter any memorial in the said book of the defendants, called the "Register of Transfers," or indorse any entry on the said deed of transfer, but have hitherto wholly neglected so to do; whereby the plaintiff has been deprived of his right and title to appear in the said books of the defendants as the holder and proprietor of the said shares; and whereby and by reason of the said N., after such delivery of the said deed of transfer and the committing of the said grievances, still appearing by the said Register of Shareholders to be the holder and proprietor of the said shares, and of divers calls having been made by the defendants after the committing of the said grievances upon divers persons so appearing by the last-mentioned book to be the holders and proprietors of shares in the said undertaking, and

amongst others the said N.; and by reason of the failure of the said N. to pay the said calls so made upon him as aforesaid, the plaintiff having received no such notice of forfeiture as in the last-mentioned Act of Parliament mentioned, the defendants, by divers persons then being the directors of the said Company lawfully appointed, did, after the committing of the said grievances, and according to the provisions of the last-mentioned Act of Parliament on that behalf, proceed to declare, and did declare, the said shares, so standing in the last-mentioned book in the name of the said N. as the holder and proprietor thereof, forfeited; which forfeiture having been afterwards, and according to the provisions of the last-mentioned Act, confirmed at a general meeting of the said Company, and the said shares so forfeited directed to be sold for the purposes of the last-mentioned Act declared, and according to the provisions thereof, the said shares so forfeited were afterwards sold by the defendants, by the said directors, according to the provisions of the last-mentioned Act of Parliament. And the plaintiff has thereby been deprived of his right to compel the defendants to make such entry and endorsement as aforesaid, and to deliver to the plaintiff, as the purchaser of the said shares, such certificate; and has also been deprived of the said shares and all benefit thereof, and all the dividends and other profits which he might and would have derived therefrom; and also the benefit of selling the said shares at an increased premium, the said shares having, since the committing of the said grievances, greatly risen in value.

Second count.—That, at the time of the committing of the grievance, the plaintiff was the lawful holder of, and well entitled to, 300 shares in the undertaking of the defendants. Nevertheless, the defendants, well knowing the premises, but contriving &c., whilst the plaintiff still continued the lawful owner of, and so entitled to, the last-mentioned shares, and before the commencement of this

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suit, wrongfully, improperly, and without any lawful cause or excuse, and in pretended exercise of the powers and authorities in that behalf given and conferred by the Companies Clauses Consolidation Act, 1845, by certain persons then being directors of the said Company lawfully appointed, declared the said shares forfeited, [stating it as in the first count]; whereby the plaintiff has lost and been deprived not only of the said shares and the benefit thereof, and all the dividends and other profits which he might and otherwise would have derived therefrom, but also of the profit of selling them at an increased premium &c.

Special demurrer and joinder.

Willes in support of the demurrer.—Both counts are bad. First, the forfeiture is a void act of the defendants. The shares are still the plaintiff's. [*Coleridge*, J.—But the defendants have sold them.] The declaration does not shew that the plaintiff has been deprived of his title to them. A share is a right to participate in the profits of an undertaking, and such right can only be divested by the modes pointed out by the statute. The act of forfeiture amounts only to a slander of title, for which no action will lie: *Owen v. Legh*(a). No act of the defendants can affect the plaintiff's rights as a shareholder. [Lord *Campbell*, C. J.—Has the plaintiff a right to share in the profits of the undertaking, or to vote, until he is registered?] Perhaps he has not; but that is not the wrong complained of: besides, the first count does not allege that a reasonable time has elapsed for registration, and on that account it is bad. [*Coleridge*, J.—How can the defendants, after declaring the shares forfeited, say that a reasonable time to register the transfer has not elapsed?]

The second count is also bad; it does not complain of any injury resulting from difficulty of proof.

(a) 3 B. & Ald. 470.

Bramwell, contra.—Supposing that the fact of forfeiture be a nullity, a good cause of action is shewn, inasmuch as the plaintiff's title is shewn only by the register, and that title-deed the defendants have in effect destroyed. The plaintiff has also lost his shares by the declaration of forfeiture, under the 29th sect. of 8 & 9 Vict. c. 16; that is a grievance to the plaintiff caused by the defendants. *Owen v. Legh* is not applicable. As to the non-allegation of the expiration of a reasonable time, it is clear that that time has elapsed, inasmuch as sufficient time has elapsed to make the call, and to declare the shares forfeited; but the defendants were bound to register immediately. However, no such allegation is necessary: *Beer v. Beer* (a).

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Willes in reply.

LORD CAMPBELL, C. J.—I think that the plaintiff is entitled to our judgment on both counts. The second shews the plaintiff to be entitled to certain specific ear-marked shares, which have been declared forfeited and sold: that is clearly a wrong and an injury. The defendants have been guilty of a wrongful act of omission, in not registering the plaintiff's name as a shareholder in their books, and also of a wrongful act of commission in declaring his shares forfeited, and in confirming that forfeiture. It is argued, that the plaintiff could have sustained no injury. But he has been deprived of the ordinary privileges of a shareholder, and of any profits that might have arisen upon the shares. Those are clearly injuries for which he has a right of action. The acts are not mere nonentities, as in the case of *Owen v. Legh*; and how does it lie in the mouth of the directors to say, that their act is void? The first count is also good. It shews specifically what the transac-

(a) 21 L. J., C. P., 124.

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tion was, and a further gravamen, the confirmation of the forfeiture and sale of the shares.

COLERIDGE, J.—I am also of the same opinion. The defendants have, by their own act, treated the wrong party as the holder of these shares, and on his supposed default sold them. That is clearly a wrongful act, by which the plaintiff has been damnified. If a man sells a book in my library without meddling with it, he does me no harm; but if he takes it away, and then sells it in market overt, I lose my book. Section 33 is very material; it shews that the vendee of the shares may, by certain steps, acquire evidence of title; and here the defendants have done all in their power to complete the title of their vendee.

ERLE, J.—I agree that the judgment ought to be for the plaintiff. Clearly there has been a breach of duty by the defendants, and a damage to the plaintiff, by the omission of the defendants to turn the inchoate title of the plaintiff into a complete one, and by their subsequent acts of commission in confirming the forfeiture and selling the shares. Has then the plaintiff suffered damage by that forfeiture? Clearly so; just as much as a man, who is entitled to have water flow through his land, is injured by a diversion though he may not want to use the water at the particular time. The registered owner may attend meetings, and has an apparent property; and the Company, though guilty of an unlawful act, may by that act complete a title in a stranger; that is an injury to the owner's right. Both counts shew, in my judgment, a cause of action.

Judgment for the plaintiff.

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COURT OF EXCHEQUER CHAMBER.

Trinity Term, 1852.

v. The Official Manager of THE DOVER AND DEAL
RAILWAY COMPANY.

*May 10,
June 1st.*

from the Court of Queen's Bench on a bill of ex-
Judgment had been given for the plaintiff below.
was commenced by the managing committee of
and Deal Railway Company, but subsequently
by the official manager under the Winding-up
declaration upon which alone judgment was
ed, that a certain Company had been formed
urpose of making a Railway from Dover to Deal,
the authority of Parliament. That doubts were
d by the managing committee whether it was
to proceed with the objects of the Company, and
o Parliament. That certain negotiations were
etween the managing committee and the South
Railway Company, of which the defendant was
an, as to certain propositions made by the one
to the other; and "in consideration that the
committee would not abandon their objects, but
ceed therewith and apply to Parliament for an
thorise the making of the Deal and Dover Rail-
would hand over the scheme to the South East-
ay Company in the event of an Act being ob-
e defendant promised the plaintiffs, that, in the
e application to Parliament failing, the South

One of the man-
aging commit-
tee of the South
Eastern Rail-
way Company
agreed with the
managing com-
mittee of a pro-
posed Railway
Company, who
required the au-
thority of Par-
liament to make
a line of Rail-
way, and who
contemplated
the abandon-
ment of their
objects, that, if
they would not
abandon their
objects, and
would hand
over the scheme
to the South
Eastern Rail-
way Company,
in the event of
an application
to Parliament
failing the
South Eastern
Railway Com-
pany would in-
sure the Com-
pany, of which
the plaintiffs
were the man-
aging commit-
tee, against any
loss which might

be said Company by such rejection and failure, and would defray all expenses that
rred in endeavouring to obtain the Act of Parliament. The South Eastern Railway
their Act, had no power so to apply their funds:—*Held*, that the contract was con-
policy and the provisions of a public Act, and was therefore void.

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Eastern Railway Company would insure the Company, of which the plaintiffs were the managing committee, against all loss which might be caused to the said Company by such rejection and failure, and would defray and pay all expenses which should be incurred by them in endeavouring to obtain the Act of Parliament." It then stated the attempt and failure and the amount of expenses incurred, and claimed that amount from the defendant, and alleged the failure of the South Eastern Railway Company to make good such loss as had been caused to the plaintiffs by such rejection and failure.

The *Solicitor-General* (Sir *F. Kelly*) (with whom were *Watson, Hoggins, and Lewis*), for the plaintiff in error (a).—The contract declared upon was to do an illegal act, and is therefore void. The South Eastern Railway Company being incorporated for a specific purpose, and their funds being applicable only to that purpose, would have no authority to apply the funds of the Company as agreed by the defendant, and the promise of the defendant was void: *The East Anglian Railway Company v. The Eastern Counties Railway Company* (b).

Channell, Serjt., (with whom was *J. Brown*, contra).—The Court will not take judicial notice that the South Eastern Railway Company is incorporated for any particular purpose, or that it is the same Company as that incorporated by the Act referred to. [*Maule*, J.—We know of one Company by the name of the South Eastern Railway Company, and I think we may fairly infer that that is the Company mentioned in the declaration, and incorporated by the Act referred to.] Then this is not a contract entered into with that Company, but a contract by an individual, that the Company shall do a certain act; and there

(a) Before *Alderson*, B., *Maule*, J., *Cresswell*, J., *Platt*, B., *Williams*, J., and *Talfourd*, J.
 (b) Ante, p. 150.

company does not apply, for there the contract was by a Company to apply their funds differently to purposes authorised by their Act.

Cur. adv. vult.

ERSON, B., now delivered the judgment of the Court. He did not think it necessary to hear the *Solicitor-General* in reply to the arguments of my Brother *Channell* in the case, nor to consider the question involved in the exceptions. We are of opinion that the declaration does not state any sufficient cause of action, and that the writ ought to be arrested for this defect. This involves the reversal of the present judgment of the Court on the Bench. The declaration stated. [His Lordship stated the effect of the declaration.] The *Solicitor-General* argued, that this promise of the defendant's was a promise, a promise that the South Eastern Railway Company should do an illegal thing, and that it was therefore void; and we are of that opinion. This is not the promise of a party, that an act impossible to be done shall be done by the defendant, or by some third person; but it is a promise that an act shall be done contrary to the public law of the country, of which both parties are bound to take notice; the act is, therefore, illegal, and a promise that it should be done is a void promise. The question we think is determined by the decision of

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the Company for the purposes directed and provided for by the Act, and for no other purpose whatever; and there the defendants having, inter alia, covenanted to pay the costs of soliciting bills then pending in Parliament, it was held, that the Act incorporating them, being a public Act, must be presumed to be known to the plaintiffs; and that they could not recover, inasmuch as the covenant entered into by the defendants was beyond the scope of their authority as a corporation, and was, therefore, illegal and void. The Court there say, such a contract is illegal; because it is contrary to the Act of Parliament, which was passed to give them certain powers as a corporation for public purposes, of advantage to the country at large, as well as for the private gain of the individual members of the corporation; and they add, that the actual assent of the whole body of shareholders would make no real difference in the matter. If this be so, both the plaintiffs and the defendant here must be taken, with full knowledge of the powers conferred on the South Eastern Railway Company, to have made a contract by which the defendant is to bind that Company to do an illegal act; not merely an act which they have not power to do, but an act contrary to public policy and the provisions of a public Act. This, we think, is a void contract, and one which, therefore, could not form the proper ground for a suit in a Court of law. The declaration is therefore, we think, bad, and the judgment ought to have been arrested in the Court below, and ought now to be arrested in this Court. We think, therefore, the judgment of the Queen's Bench must, for these reasons, be reversed, and that the judgment must be arrested.

Judgment reversed.

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COURT OF QUEEN'S BENCH.

Michaelmas Term, 1852.

BOLCKOW and Another v. THE HERNE BAY PIER COMPANY. Nov. 12th.

DEBT.—The declaration was on five bonds. The defendants craved oyer of the bonds and conditions. They were in the same form as follows:—

“No. 50.

“Bond 100*l*.

“Know all men, that the Herne Bay Pier Company are held and firmly bound to Henry Bolckow and John Vaughan, their executors, administrators, and assigns, in the penal sum of 200*l*. of lawful money of Great Britain, to be paid to the said H. B. and J. V., their certain attorney, executors, administrators, or assigns; for which payment, well and truly to be made, the said Herne Bay Pier Company do hereby bind themselves and their successors firmly by these presents, sealed with the common seal of the said Herne Bay Pier Company, this 1st of March, 1848.”

“Whereas, in and by an Act of Parliament,” passed (6 & 7 Will. 4, c. cxii.) “intituled,” &c., “it was, among other things, enacted (*a*), that if the said Company should think it expedient to borrow the sum of 30,000*l*., or any part thereof, by bond or bonds under their common seal, it should be lawful for them so to do; and the money secured by such bond or bonds should be made payable in such manner, and at such time or times, and at such legal or less rate of interest, as the said Company should think proper;

By 6 & 7 Will. 4, c. cxii., a Company was empowered to borrow money by bond, payable in such manner and at such times as they might think proper; and it was enacted, that all persons to whom any such security should be given, should be equally entitled to a claim or lien on the rents, rates, tolls, and profits, in proportion to the respective sums mentioned thereby to be secured, and without any preference by reason of the priority of date of any such securities, or on any other account. The Company gave to the plaintiff a common money bond:—*Held*, that an action lay on such bond, notwithstanding the above provision.

Whether effect would be given to the above clause, forbidding a preference, in restraining execution—*Quære*.

(a) Sect. 9.

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and the rents, rates, tolls, and profits which should from time to time arise in respect of the said undertaking, should be a security for the money so to be borrowed as aforesaid, with interest, to the person or persons who should from time to time be entitled to such securities, and the principal money and interest thereby secured: and all persons to whom any such securities, either by way of mortgage, as therein mentioned, or bond, should be given or transferred, or in whom they should become so vested, should be equally entitled to a claim or lien on the said rents, rates, tolls, and profits, in proportion to the respective sums mentioned thereby to be secured, and without any preference by reason of the priority of the date of any such securities, or on any other account whatsoever. And whereas the said Company think it expedient to borrow part of the sum of 30,000*l.* by bond or bonds under their common seal, and pursuant to the said Act of Parliament, and in exercise and execution of the power and authority to them thereby given they have agreed to borrow the sum of 100*l.*, part thereof, from the said Henry Bolckow and John Vaughan: Now the condition of the above obligation is such, that, if the above-bounden Herne Bay Pier Company do and shall well and truly pay or cause to be paid unto the said Henry Bolckow and John Vaughan, their executors, administrators, or assigns, at the office for the time being of the said Herne Bay Pier Company, the said sum of 100*l.* of lawful money of Great Britain, on the 1st of March, 1851, and do and shall well and truly pay interest upon and for the same, at and after the rate of 5*l.* for every 100*l.* for a year, by even and equal half-yearly payments, on the 1st day of September and the 1st day of March in each and every year, without any deduction or abatement whatsoever, except property or income tax, then, and in such case, the above written bond or obligation shall be void; but otherwise the same shall be and remain in full force and virtue."

Demurrer.—That, by 6 & 7 Will. 4, c. cxii., no action lies for the principal secured by the bond. That, if the action be for interest only, the declaration should be special.

Joinder in demurrer.

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Willes, in support of the judgment.—The 6 & 7 Will. 4, c. cxii. s. 9, has the effect of cutting down the plaintiffs' right to recover on the contract, and of giving them a lien on the undertaking; and if the plaintiffs can proceed by action they may obtain judgment, issue an *elegit*, and so obtain a preference, which is prohibited by the statute: *Pontet v. The Basingstoke Canal Company* (a), *Doe d. Myatt v. The St. Helen's Railway Company* (b). The case of *Hart v. The Eastern Union Railway Company* (c) is not applicable; that case proceeded on the ground that the words of the debenture created a covenant, and that the right of action thereby created was not taken away by the particular words of the Act, and that the judgment could be satisfied out of the profits of the Company as carriers.—He cited *Russell v. The East Anglian Railway Company* (d).

J. Addison contra.—An express power is given by sect. 11 (e), to sue for interest, and it does not appear that the plaintiffs are suing for anything else. But the plaintiffs may recover both for principal and interest: *Doe d. Banks v. Booth* (f).—He was then stopped.

(a) 3 Bing. N. C. 433.

(b) Ante, Vol. 2, p. 756; 2 Q. B. 364.

(c) Ante, Vol. 6, p. 818; 7 Exch. 246.

(d) Ante, Vol. 6, p. 532; 3 Mac. & G. 125.

(e) Which, after giving power to two justices to appoint a receiver in case interest shall be

unpaid for thirty days after the same shall be due, enacts, "But in case the power aforesaid shall not be resorted to, the interest so due and unpaid as aforesaid may be sued for and recovered with costs by action of debt in any of his Majesty's Courts of Record at Westminster."

(f) 2 B. & P. 219.

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Willes in reply, contended, that the declaration was not framed to meet a case under sect. 11.

LORD CAMPBELL, C. J.—All that we are now called upon to say is, whether an action lies on these bonds. And I think there is no sufficient reason for saying that it does not. The 9th section expressly authorises the Company to make bonds payable at such time as they shall think proper, and they have entered into these bonds, payable on a day certain, with interest payable half yearly. *Prima facie*, therefore, an action lies on them; and the onus is thrown on the defendants to shew something that prevents it. Mr. *Willes* relies on the words, that the bondholders and mortgagees shall not have any preference one over the other. It is now only necessary to decide whether these words bar the action. I do not think they do; what effect they have in restraining execution must be considered when the plaintiffs seek to issue execution or to assign breaches. No authority is cited to shew that an action does not lie on a bond under these circumstances; and *Hart v. The Eastern Union Railway Company* is an authority in favour of the action lying.

COLERIDGE, J.—Sect. 9 is less obscure than sect. 11, and I confine my judgment entirely to the former section. [His Lordship then read that section as far as the words “principal money and interest thereby secured.”] If the enactment had stopped here, and the bond had been given by the Company, making the money payable on a day certain, no one could doubt that an action would lie, as on an ordinary bond. Then the onus is cast on the defendants to shew that this right of action is taken away, either by express words or by necessary implication. It is not taken away by express words, nor is it, as I think, by implication. The enactment is, that mortgagees and bondholders shall be equally entitled to a claim or lien, and without any pre-

ce one over the other. No doubt it is difficult to construe this enactment so as to give it full effect. It is said, if a judgment be obtained, by issuing execution the plaintiffs may obtain a preference over the other bondholders, in contravention of this provision. But I do not think that that would be a necessary consequence. The statute may have the effect given them to restrain the execution, but they are not sufficient to prevent the action being brought.

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WIGHTMAN, J.—I think that the construction of the Act is very difficult; but there seems to me to be nothing in it to prevent the plaintiffs from suing on such bonds as these. The Company, in exercise of the power given to them, have executed common money bonds, and an action lies upon them, unless there are words in the Act prohibiting it. I find none. The enactment, giving a lien, prohibiting a preference, may have an effect of putting plaintiffs under a disability in obtaining the fruits of their judgment, at least by elegit; but I see nothing to prevent their obtaining judgment as in an ordinary case.

WIGHTMAN, J., concurred.

Judgment for the plaintiffs.

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Michaelmas Term, 1851.

REGINA, on the Prosecution of BURTON and LEAING, v. THE
YORK AND NORTH MIDLAND RAILWAY COMPANY.

MANDAMUS.—The writ, dated 17th November, 1851, stated, that, by “The York and North Midland (East Riding Branches, No. 1) Railway Act, 1846” (9 & 10 Mandamus.—The writ stated that the defendants had obtained an Act of Parliament in 1846, reciting that it would be of public advantage if a Railway were formed from York to Beverley by Market Weighton, and that they were willing to execute the same, and that it was enacted that it should be lawful for the defendants to make and maintain the same. That the Company made and opened to the public this branch from York to Market Weighton. That in 1849 they obtained another Act, to enable them to divert this line between Market Weighton and Cherry Burton, a place three miles from Beverley; which recited that it would be an advantage if such diversion were made; that the defendants were willing to make such diversion; and that it enacted that it should be lawful for the defendants to make such deviation. That Burton and Leaing were owners of a portion of the land required by the defendants; and that part thereof had been conveyed to the defendants for the purpose of the line as originally authorised. The writ then commanded the defendants to complete the line between Market Weighton and Cherry Burton.

Held, by Lord Campbell, C. J., Crompton, J., concurring, that the mandamus was good, and that the Company were bound to complete the line.

Whether a Company, incorporated by Act of Parliament, which says that “it shall be lawful for them” to make a certain Railway, are bound to make it, if they have never availed themselves of the extraordinary powers conferred upon them, and they have come to a resolution to abandon the undertaking before they had begun to execute it—*Quære*. Though, down to the time when the Company in fact exercise the extraordinary powers conferred upon them over the property and rights of others, the power to do so may be only permissive, a different state of things arises when they begin the exercise of those powers, and have taken land under the Act, and when they purchase it under their compulsory powers, which they do when they serve a notice requiring the land, they enter into a contract to construct the Railway with the termini specified in the Act. The engagement of such a Company is part of the compensation given to the landowner.

The defendants returned, that, of the line from York to Beverley, the part between Cherry Burton and Beverley had not been begun to be made, and that the compulsory powers of purchasing land for making it expired in July, 1851:—*Held*, that there was no allegation of impossibility or want of power to purchase lands to complete the line between Market Weighton and Cherry Burton, and that the return was bad.

It further alleged, that Cherry Burton was a small village, that a convenient station could not be made there for the inhabitants of Beverley, and that the district between Market Weighton and Cherry Burton was thinly peopled, and that there were means of convenient communication from that to other places in England irrespective of this Railway to Beverley:—*Held*, bad.

It also alleged that the portion of the line described in the mandamus could not be remunerative:—*Held*, bad; though an absolute exhaustion of funds, and an impossibility of raising any, might be a good return.

If, upon an application for a mandamus, it were clearly made out that the Company, though carrying out the design with good faith and prudence, was, from unforeseen casualties, left entirely without funds, the Court would refuse the application.

Held, by Erle, J., that the statute alone created no duty to complete the line. That the obligation arising from taking land to make the Railway thereon is fulfilled by making and opening an available Railway as far as the land taken.

12 & 13 Vict. c. lxv.), reciting that "it would be attended with local and public advantage if a Railway were formed from the line of the York and Scarborough Railway at or near York to Beverley, by way of Market Weighton, &c.; and that the defendants were willing to execute the same;" and,—after incorporating certain other Acts, the defendants were empowered to raise, by the creation of shares or otherwise, additional capital; and it was enacted, that, subject to the provisions of the said Act, and of the Lands Clauses Consolidation Act, 1845, and the Railways Clauses Consolidation Act, 1845, it should "be lawful" for the defendants "to make and maintain the said railways and works" in the line therein described, and upon the lands delineated in the plans and books of reference; and it was further enacted, that the powers of the Company for the compulsory purchase of land for the purposes of the same Act should not be exercised after the expiration of the three years from the passing of that Act; and that the said Railway should be completed within five years from the passing of the said Act; and that, on the expiration of such period, the powers by the said Act granted should cease to be exercised, except as to so much of such Railway as should be then completed. The writ also set out "The York and North Midland Railway Act, 1849" (12 & 13 Vict. c. lx.), which, reciting that part of the said Railway from York to Market Weighton had been then made and opened to the public, and that "it would be of advantage" if part of the said line between Market Weighton and Beverley were diverted, and the part rendered unnecessary by such diversion abandoned; and that the defendants were willing to make such diversion:—enacted, that it should "be lawful" for the defendants to make and maintain a Railway, commencing by a junction with the before-mentioned line at Market Weighton, describing the route, and terminating by another junction therewith at

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a point on the said Railway near to a highway leading to Cherry Burton; and that the powers for the compulsory purchase of land for the purposes of the last-mentioned Act should not be exercised after the expiration of three years from the passing thereof; and also that the period limited by the Act of 1846, for the exercise of the powers of compulsory purchase of lands thereby authorised to be taken for the purposes of that Act, should, so far as related to lands required for so much of the Railway originally authorised as lay between the said point near the said highway leading to Cherry Burton and the termination of the said original line at Beverley, be, and the same were thereby extended, for the further period of two years, and the time for the execution and completion of this portion was further extended for five years; and it was further enacted, that the defendants should abandon and relinquish the construction of so much of the line originally authorised as lay between Market Weighton and the said point near to the highway aforesaid; and that all the powers and authorities for making and maintaining the same should, immediately after the passing of the last-mentioned Act, cease and determine.

The writ further alleged that a reasonable time for the defendants to have proceeded to make and complete the said line of Railway authorised by the said Act of 1849 had elapsed; yet that the defendants had not, since the passing of that Act, done or taken any step or act either as to the purchase of land or otherwise, for making or completing the same, or commencing to make or complete the same; but, on the contrary, that they had abandoned all intention of making and completing the same or any part thereof; that David Burton was owner of lands in Cherry Burton, through which the original line of Railway was to be made; and that such original line intersected his said lands, as well at that part authorised to be abandon-

as at the part for the making of which the time was intended, and was also owner of other lands, through which the diverted line of Railway was to pass; and that the name of the said D. Burton was contained in the books of reference to the said plans so deposited; and that John Leaing was also owner of lands in the township of Market Weighton, through which the Railway, as originally authorised, was to pass; and that his name was mentioned in the said books of reference; and that a portion of his lands was conveyed to and taken by the defendants for the purposes of the said original Railway; and that the remaining portion of his said lands adjoining those so taken as aforesaid were much lessened in value by reason of the non-completion of the said line of Railway. The writ so alleged, that the portion of the original line, for the making of which the powers of the defendants for the compulsory purchase of land were by the said Act of 1849 extended for the said term of two years, was of the length of three miles or thereabouts; and that the said D. Burton and J. Leaing were desirous that the said line, authorised by the Act of 1849, should be made and completed; and that the making and completion of the same would be of great public advantage, by affording to the inhabitants of Beverley and Cherry Burton and of the surrounding districts means of speedy and easy communication with York and the North of England, and Selby and the West of England, and to the inhabitants of the districts intervening between Market Weighton and Cherry Burton means of speedy and easy communication with Beverley and Hull, Driffield, Bridlington, Scarborough, Whitby, and Malton; that, although the said D. Burton and J. Leaing had required the defendants to do and take all necessary acts and steps, both as to the purchase of lands and otherwise, for making and completing the last-mentioned line of Railway, yet, that they had absolutely refused to make and complete the said line, or any part

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thereof, or to take or commence any steps or acts for that purpose. The writ then commanded the defendants to proceed to purchase the lands necessary and required for the making and completing the said line of Railway authorised by the said Act of 1849, and to proceed to make, and to make and complete the same pursuant to the provisions of the last-mentioned Act, and of the Acts incorporated therewith, or to shew cause to the contrary.

The return stated that the writ came to the defendants on the 24th of December, 1851, and not before; that the extended period for the compulsory purchase of land for the purposes of the Act of 1846, so far as related to the said part of the line of about three miles, lying between Cherry Burton and Beverley, expired before the issuing of the above writ, namely, on the 13th of July, 1851; and that no part of such portion of the original line had been made, nor had any lands upon that part of the line been purchased or agreed to be purchased, nor had any notice for the purchase thereof been given by the defendants before the coming of the said writ to them; and that the defendants, at the time of the coming of the writ to them, had not any power or authority to purchase or take any of such last-mentioned lands, nor could they make the said part of the said line, or any part thereof; and that the purchasing or acquiring, or taking or getting possession of the said lands, and the making of the last-mentioned portion of the said Railway, was, at the time of the issuing of the said writ and thence hitherto hath been, impracticable and impossible; that the line authorised by the Act of 1849, and which the defendants were, by the said writ, commanded to make, was a mere diversion or deviation of an integral part of the said Railway, authorised to be made by the Act of 1846; and that the point on the same Railway, near the said highway, was not the site of any town or village, and was three miles from Beverley, which was the nearest town, and was too far from Bever-

be adapted for the site of a station for that town; that a station built there would be very inconvenient to inhabitants of Beverley, and for persons travelling from that place along the proposed Railway; that Burton was a small and inconsiderable village, the population of it and the district next around the was very small; and that the tolls and charges to be d from traffic along the said Railway, if made, not only not be remunerative, but would be insufficient to pay the necessary cost of conveying such traffic maintaining the same Railway; and that the making thereof would be an useless expenditure of labour and, whilst it would be destructive of the lands through it would go, for any agricultural or other useful or cial purpose; and that the district between Market ton and Beverley, through which the said Railway, de, would run, contained merely a few agricultural es of small extent and thinly populated; and that were, and are, easy and convenient communications ilway from Beverley and Market Weighton to York he North of England, and between Beverley and the al towns of Hull, Driffield, Bridlington, Scarborough, by, and Malton, and all parts of England traversed ailway; and that the facilities of such communica- , so far as the same related to York and the North of and, would be increased by the opening of the Malton Driffield Junction Railway, and the Malton and Thirsk ay, respectively, the former of which was already com- d except a very small portion thereof, and the latter n the course of construction; and both of which Rail- would be opened to the public in a much shorter d than the said Railway from Market Weighton to rley could be constructed in, even if the powers of lefendants to complete the same were still in force; all the money applicable to the purposes of the Act

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of 1849, which could in reasonable probability come to the possession of or be disposed of by the defendants, would all have to a very large sum of money, and not less than 100,000*l.* of the ~~unproductive~~ sum necessary for the making of the railway authorised by the said Act of 1849; and that in reason of the purposes the making of the said railway, authorised by the said Act of 1849, with or without the said objection at the time of the issuing of the writ was and is impracticable and impossible: wherefore the defendants could not at the issuing of the writ, nor were they then by law bound or bound by the said Acts to purchase or purchase the said lands necessary for the making and completing of the said line of railway authorised by the Act of 1849, and in the said writ mentioned.

DEFENDERS AND PLAINTIFFS.

The arguments are omitted as they are fully stated in the judgments.

Hugh Hall for the Crown.—He cited *Blakenore v. The Glamorgan and Swansea Navigation &c. Reg. v. Eastern Counties Railway Company* *b.* *Reg. v. Cumberworth* *(c)*, *Lee v. Milner* *d.*, *Reg. v. Edge Lane* *e.* *Reg. v. Caledonian Railway Company* *f.*, *Com. Dig. Parliament*, R. 22, *Reg. v. St. Saviour's, Southwark* *g.*, *Reg. v. Barlow* *h.*, *Maddougall v. Paterson* *i.*, *Reg. v. London and North Western Railway Company* *k.*, *Reg. v. Luton Road Trustees* *l.*, *Reg. v. The Commissioners of Woods and Forests* *(m)*.

The Solicitor-General (Sir F. Kelly), Addison with him,

- (a) 1 My. & K. 154.
- (b) 10 A. & E. 531.
- (c) 3 B. & Ad. 108.
- (d) 2 M. & W. 824.
- (e) 4 A. & E. 723.
- (f) 16 Q. B. 19.

- (g) 7 A. & E. 935.
- (h) 2 Salk. 609.
- (i) 21 L. J., C. P., 27.
- (k) 6 Railw. Cas. 634.
- (l) 1 Q. B. 860.
- (m) 19 L. J., Q. B., 497.

the defendants, cited *Reg. v. Eastern Counties Railway Company* (a), *Cohen v. Wilkinson* (b), *M'Gregor v. Doncaster and Great Northern Railway Company* (c), *East Anglian and Eastern Counties Railway Company* (d), *Anstruther v. East Fife Railway Company* (e), *Rex v. Birmingham Canal Navigation Company* (f), *Lee v. Milner* (g).

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By Mr. Hill, in reply, cited *Webb v. The Manchester and Leeds Railway Company* (h), *Priestley v. Fould* (i), *The North of England, Clarence &c. Railway Company v. Clarence Railway Company* (k).

The learned Judges not being agreed, the following judgments were delivered.

Nov. 16th.

LE, J.—Upon this record, the material facts appear to be these:—The defendants had obtained an Act of Parliament, making it lawful for them to construct a Railway from York through Market Weighton to Beverley, and giving them the usual powers for that purpose, and they completed and opened a part of the line as far as Market Weighton, and had not begun upon the remainder. About three miles of this remainder nearest to Beverley, the powers under the Act had expired, and the mandamus related to the making of a part only of this remainder, running through a thinly-peopled district, and ending in the village of Burton, without ulterior Railway communication. One of the applicants was a landowner, who had land on both sides of the line both between York and Weighton, and also

10 A. & E. 531.

Ante, Vol. 5, p. 741; 12

125; 1 M. & G. 481.

Ante, p. 229.

Ante, p. 150.

1 Macq., H. L. Scotch App.

98.

(f) 2 W. Bl. 708.

(g) 2 Y. & C. 611.

(h) Ante, Vol. 1, p. 576; 4 My. & Cr. 116.

(i) Ante, Vol. 2, p. 422; 2 M. & Gr. 175.

(k) Ante, Vol. 3, p. 605.

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between Weighton and Beverley, and a part of his land had been used for the part of the line that was complete.

Upon these facts, the defendants contend that no legal obligation to complete the line of Railway is shewn; and in answer thereto, the prosecutors allege, first, that the obligation was created by the statute alone; and, secondly, by the statute, together with the subsequent facts. The first ground is of wide application, and involves important consequences to valuable property. It assumes, that all private Acts of Parliament, granting to applicants powers of compulsory purchase of lands and other powers, for the purpose of executing a project represented to be beneficial to the public, impose the legal duty upon the grantees of doing all that they are so empowered to do, until the project is executed, and, in case of omission, make the grantees liable to indictment and to action, at the suit of any party who is specially damaged, and also liable to be called on for specific performance of their project by mandamus. If the duty is supposed to be created by the statute, the question must be decided by the words of the statute, construed according to ordinary rules, and must depend upon the intention of the legislature to be collected therefrom; and according to my understanding of this statute, the legal duty of completing the projected Railway was not imposed thereby. The language in respect of making the Railway is permissive, not imperative; the distinction between permissive and imperative language being maintained throughout the statutes on this subject. Imperative language is used when a clear duty is to be created, and permissive language in common understanding would express that the matter is to be optional: thus, the Company is permitted at their option to take lands, turn roads, alter streams, and exercise other powers, and these matters are made lawful for them; but they are commanded to make compensation for lands taken, to substitute new roads for those they turn, and to perform

er conditions relating to the exercise of the powers; and
e matters are required from them.

Also, where there is reason for departing from the usual
rse, and the duty of completing the Railway is intended
e absolutely or conditionally imposed, imperative lan-
ge has been substituted for permissive, and Companies
e been required to make their lines. The provisions
hibiting the commencement of operations till the capi-
has been subscribed for, and putting an end to the
ers after the lapse of three or five years if the Rail-
r is not then completed, indicate that the legislature,
ead of creating an absolute duty, granted a privilege,
be exercised at option, upon a contingency, within a
ited time.

The statute is passed on the assumption that the under-
ing will be profitable, and that therefore the work will
willingly continued; and when the completion would
attended with loss, the general public interest is against
completion, though the interest of some of the adjacent
downers may be promoted in sinking the capital of
ers for the improvement of their estates. There seems
me to be no ground for the notion that the powers
nted to the Company ought to be regarded in the light
a consideration for undertaking an onerous duty; gene-
ly speaking, they are no boon unless they lead to a
profitable undertaking: thus the power of taking land on
e terms of paying both its market value and compensa-
n for damage, and restoring it at a less price if no
ulway is made, or the power of turning roads and streams,
th a present substitution and a future restoration, give
advantage, and are not desirable, unless as a means to
profitable end. Every step, from preparing for applying

Parliament until the opening of the line, is a loss of
bour and capital, consented to by the Company for the
ivilege of attempting to make a profitable work in the
ad, which privilege is granted by Parliament, because the

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profit, if any, must be attained through the promotion of the public convenience. Also, equally groundless, in my opinion, is the notion, that the consent of some of the landowners to their lands being bought for a price, compensating for all value and all damage, is a consideration for each landowner on the line to demand the outlay of the Company's funds for the benefit of his estate, against the interest of the shareholders, and possibly against the wish of many of his neighbours. The different landowners may claim different rights. A landowner may oppose the bill, and, after it has passed, insist upon the utmost for value and damage in respect of land taken; or he may oppose till his consent is bought at the best price he can get for it, and he may also insist on the utmost for value and damage; or he may consent to the bill, and to take agricultural value for his land, and receive payment in shares. In the first and second instances, he would seem to me to have no ulterior right beyond the restoration of his land if no Railway is made. In the last case, there may be a civil right against the other shareholders, to require that the shares should be paid up, and the funds applied in the best manner for the project; and a mandamus may be so framed as to be a beneficial remedy for the enforcement of this and other civil rights, resembling rights from contract. But the prosecutors of the present writ have no such case; they rely partly on a breach of public duty, for which any one may indict, and partly on the private wrong of suffering special loss from not having the benefit of railway communication for their land, for which an action would lie, and partly on the assumption of a quasi contract between each landowner and the Company; but I think that neither of the first two points would support the writ; and the mere fact of being landowner on the line is not sufficient to establish the third. For these reasons, I come to the conclusion, that the present writ cannot be sustained on the first ground

ove mentioned, viz. that the statute alone created the
ty; and, indeed, upon the argument in this case, this
ound was not at all relied on.

Then, was the duty in question created by the statute
gether with the subsequent facts, that is, by the statute,
lowed by the exercise of some of the compulsory powers
anted thereby? In disposing of this question, I beg to
nfine myself to the facts of this case; and, although they
e not in my judgment sufficient to support this writ, still,
any cases may occur where the exercise of some of the com-
ulsory powers may create a duty, to be enforced by man-
mus.

Here, a part of the proposed line, as far as there was
y prospect of profit, has been made; the residue has been
andoned, not from any corrupt motive of favour or ill
ill, nor with any deception or bad faith, but because Be-
erley has other railway accommodation, and the district
om Market Weighton to Burton alone would not repay
e necessary expenditure. Where the defendants have
ken land, they have made and opened a Railway; and
here they have abandoned their project, they have taken
way no existing public right, they merely leave the dis-
rict in its former state.

To ascertain whether the duty arises upon these facts,
ecourse must again be had to the statute, for the facts
aken by themselves are wholly inoperative to originate
he supposed duty; the statute might attach any legal con-
equence to them, but, unless they have a statutable
orce, they operate nothing. Now, throughout the statute,
o provision is found to the effect contended for; there is
o enactment requiring the completion of the whole if a
art is begun, and no indication of an intention in the le-
islature, that this increased responsibility should arise
rom the exercising of any of the powers, or the making
f part of the line. The supposition, that the prosecutors
onsented to the bill before Parliament, in the expectation

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of the whole line being made, or that the incomplete line is an inconvenience or desight to the neighbourhood, is no origin for a legal duty to complete the line; they are considerations which might guide Parliament in respect of imposing that duty; but if there are no words in the Act that can be justly construed to create it, these considerations do not authorise the Court to decide that such a duty was created. The obligation arising from taking land to make a Railway thereon, appears to me fulfilled by making and opening an available Railway as far as the land is taken; and the owner of land so taken does not, in my opinion, acquire a better right than other landowners in respect of his land on the line that has been abandoned.

This brings me to the consideration of the main ground of the prosecutors, namely, Lord *Eldon's* words in *Blakemore v. Glamorganshire Canal Navigation* (a), who, speaking of Acts obtained by Companies for private undertakings, says, "When I look upon these Acts of Parliament, I regard them all in the light of contracts, made by the legislature on behalf of every person interested in anything to be done under them; and I have no hesitation in asserting, that, unless that principle is applied in construing statutes of this description, they become instruments of greater oppression than anything in the whole system of administration under our constitution. Such Acts of Parliament have now become extremely numerous; and from their number and operation, they so much affect individuals, that I apprehend those who come for them to Parliament do, in effect, undertake that they should do and submit to whatever the legislature empowers and compels them to do, and that they shall do nothing else; that they shall do and shall forbear all that they are thereby required to do and to forbear, as well with reference to the interests of the public as with reference to the interests of individuals."

Lord *Eldon* is supposed to have here laid down, that

(a) 1 My. & K. 162.

Companies can be compelled to do all that they are empowered to do under their Act; but his words do not bear this meaning; he says, the Companies shall do whatever the legislature empowers *and* compels them to do; whereas he is supposed to say, they shall do whatever the legislature either empowers *or* compels them to do. It cannot be supposed, that the learned Judge meant to construe words of permission empowering an act, to be words of command requiring that act, if the legislature did not so intend. The supposed principle was not involved in the judgment he was pronouncing relating to the surplus water of the canal, because the duty of leaving that surplus water, and the right of taking it, were created by appropriate words in the statute then in question, and the point for judgment was the meaning of surplus water. The words occur when the learned Judge is disposing of the question, whether Mr. Blakemore's right to this water under the statute was affected by the quality of his right before the statute; this, of course, is answered in the negative, for the statute is the origin of a new right created thereby, and such a new right is unaffected by old rights previous to the statute inconsistent therewith. If the learned Judge regarded these statutes in the light of contracts, because rights created by such statutes are as original as rights created by contract, the observation is relevant, and is assented to as soon as understood. The same remark would apply to the concluding observation. If he meant that a Company must do what the legislature compels it to do, that is, must obey the law, both propositions are too obvious to require expression. But, if the learned Judge is taken to mean, that words in the class of statutes he referred to, should receive a construction different from their ordinary meaning, upon the ground that such statutes would be a source of the greatest oppression if construed as usual, I think his meaning has been misunderstood, and such doc-

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trine seems to me to be altogether erroneous. The attempt to introduce the incidents of a supposed contract between the Company and other persons, and to regard the statute in the light of such contract, leads to confusion in reasoning; while the suggestion of the danger of the greatest oppression, unless a new principle of construction should be adopted against Companies, creates an unjust prejudice in feeling. This passage has been often cited; at times in the sense that the Company must do what their statute requires them to do, in which it is harmless; at other times in the sense that they must do all that their Act empowers them to do. In the latter sense, they were the foundation for the first decision in *The Queen v. The Eastern Counties Railway Company* (a), where the writ was issued commanding the completion of the whole line. Because the statute empowered the Company to make the whole line, therefore it was construed to require it.

This ground was again repeated when the peremptory mandamus was applied for and refused, by reason of some informality in the first writ; but it was then accompanied by the observation, that the case was in some respects new, and that its circumstances admitted of some doubt whether the power of the Court ought to be applied to them. It is upon these authorities, that the present application for the first instance of issuing a peremptory writ of mandamus to complete a Railway is rested.

On the other side is the observation of Lord *Mansfield* in *The King v. The Proprietors of the Birmingham Canal Navigation* (b), where a writ to the same effect as the present was applied for on stronger grounds than exist here, but refused by that eminent Judge in these words: "The Act imports only an authority to the proprietors, not a command; they may desert or suspend the whole work, and, à fortiori,

(a) 10 A. & E. 531.

(b) 2 Wm. Bl. 708.

any part of it." In *The King v. The Severn and Wye Railway Company*(a), the defendants destroyed a Railway, it being a public highway, which the applicants had used, and required to use again; the writ, therefore, commanding the reinstatement of it for the use of those who had a clear right to it, was in ordinary course; the duty and the right were admitted to be clear, and the only objection was, that the complainant had a remedy by indictment; but a mandamus to restore was considered to be better redress; still, in granting the mandamus so to restore, the Court expressly refused to command the maintaining of the way after restoring, although, by the statute, the Company were empowered to maintain as well as to make the way.

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Upon this review, there appears to be no precedent for issuing the writ now prayed for, and no instance has been cited of an indictment or action upon the supposed principle which is the foundation of the prosecutors' case. This absence of any precedent is equivalent to an authority against the existence of the principle; the occasions for bringing the principle into action, if it had existed, having been extremely numerous.

The cases at law in which the principle has been under judicial consideration have been mentioned above, and the cases in equity bear rather upon the rights of shareholders inter se, than upon the duties of the Companies towards the public; and, upon the whole, the balance of authority appears to me to be against the prosecutors.

Considerations of convenience tend to the same conclusion. If the writ is refused, it will be for the legislature in future to declare by clear words what duty is to be created, when it is to come into operation, and how to be enforced; and the law will be known. If the writ is granted, many questions, relating as well to the rights and du-

(a) 2 B. & Ald. 646.

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ties of directors, as also to the remedy by mandamus for enforcing specific performance of very complicated duties, will remain to be settled hereafter by the discretion of the Court; and in the meantime, the law as to these important matters will be left in uncertainty, and facilities for harassing by malicious litigation will be at the disposal of those who have ill-will against a Company. In the present case, there is a further defence, on the ground that the mandamus requires an incomplete work, which would probably remain useless. But, after expressing my opinion on the general grounds, it is needless further to advert to this point, and I think the judgment should be for the defendants.

Lord CAMPBELL, C. J.—The first question to be considered in this case is, whether the writ of mandamus be good upon the face of it? The defendants, having been incorporated by Act of Parliament in the reign of Will 4, under the title of “The York and North Midland Railway Company,” obtained another Act of Parliament in the year 1846, which, reciting “that it would be attended with local and public advantage, if a Railway were formed from the line of the York and Scarborough Railway, at or near the city of York, to Beverley, by Market Weighton, and that they were willing to execute the same,” gives them, for this purpose, all the powers conferred by their former special Acts, and by the Railways Clauses Consolidation Act, with powers to borrow additional sums of money; and enacts, that “it shall be lawful for the said Company to make and maintain the said Railway in the line and upon the lands delineated in the plans and described in the books deposited with the clerks of the peace; and to enter upon, take, and use such of the said lands as should be necessary for such purpose.” It appears that the Company actually made this branch as far as from York to Market Weighton, about two thirds of the whole distance to Beverley; and so far

was opened to the public. They then, in the year 1849, obtained another Act, to enable them to divert this line in its former direction between Market Weighton and Ferry Burton, a place about three miles from Beverley. This Act, reciting that it would be of advantage if part of the said line between Market Weighton and Beverley were diverted, and if the part rendered unnecessary by such diversion were abandoned, and that the Company were willing to make such diversion, gives all the powers of the former Railway Acts for making this diversion, and enacts that "it shall be lawful for the Company to make and maintain the said Railway in the line and upon the lands described" in certain new books of reference, "and to enter upon, take, and use such of the said lands as should be necessary for such purpose." The mandamus, after setting out the material parts of these Acts of Parliament, alleges, "that, although a reasonable time for completing the Railway mentioned in the last Act had elapsed, the Company had not made it, and had abandoned all intention to make and complete it." Allegations are then introduced, that David Burton, one of the prosecutors, at the time of the passing of the Act of 1846, was and still is owner of lands over which, by that Act, the Railway was to pass, and authorised to be abandoned by the Act of 1849; and at the passing of the latter Act, he was and still is owner of other lands which the line, described in the Act of 1849, would pass over, as shewn in the books of reference; and that John Leaing, at the time of the passing of these Acts, was and still is owner of lands which the Company were authorised to take, and that a portion of his lands had been required by the Company, and had been by him conveyed to the Company for the purpose aforesaid; and that the remaining portion of his lands was much lessened in value, by reason of the non-completion of the said line of Railway; and that the compulsory powers of the Act of 1846 had been duly ex-

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tended for two years; and that Burton and Leaing were desirous that the line should be completed; and that the completion of the same would be of great public benefit and advantage, by affording to the inhabitants of the said towns of Beverley and Cherry Burton and the surrounding districts, means of easy and speedy communication with York and the North of England, and Selby and the West of England, and to the inhabitants of the districts intervening between Market Weighton and Cherry Burton means of easy and speedy communication with Beverley, and with Hull, Driffield, and Bridlington, Scarborough, Whitby, and Malton." The writ, after further alleging a request to the Company by Burton and Leaing to complete the line of diversion mentioned in the Act of 1849, and a refusal so to do, proceeds to command the Company to complete the Railroad from Market Weighton to Cherry Burton, or to shew cause to the contrary.

The portion of the line between Market Weighton and Cherry Burton, to which the mandamus applies, is not to be considered a separate Railway, or even a separate branch of Railway, but is clearly to be treated as if in its present direction it had been included in the Act of 1846, the powers of compulsory purchase for making it being extended to the 13th of July, 1852, although the powers of compulsory purchase for making the remainder of the line, from Cherry Burton to Beverley expired on the 18th of June, 1849. Under these circumstances, are the prosecutors, *primâ facie*, entitled to this mandamus?

To answer this question, it is unnecessary to decide whether a Company, incorporated by an Act of Parliament, which says that it "shall be lawful for them" to make a certain Railway, are bound to make it, if they have never availed themselves of the extraordinary powers conferred upon them, and they had come to a resolution entirely to abandon the undertaking before they had begun to execute it. Even if it were conceded, that, down to the time

ave made and opened a part of the Railway. They ; in the situation of purchasers of land, with liberty vert it to any purpose, or to allow it to lie waste. are allowed to purchase it only for the purpose of a ay; and when they do purchase it under the compul- owers conferred upon them, which we have held ey do when they serve a notice that they require d, I am clearly of opinion that they enter into a ct to construct a Railway upon it. It was only a view to the construction of a Railway that the lsory powers were conferred; and there must be an tion on the Company to apply the land so obtained t and to no other purpose. But this contract with ividual landowner cannot be performed by merely rails over the section of land taken from him. It ever intended that he should be left with a high l or a deep cutting running through the middle of ate, and leading neither from nor to any other ter- . What, then, are to be the termini? Surely those ed in the Railway Act. The legislature contem- the completion of this Railway when it passed the The enjoyment of such a Railway is part of the nsation given to the landowner for depriving him of operty against his will, and may, in many cases, be taken into consideration in estimating the compen- he is to receive. A Railway being partly made, the



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to the Company capriciously, or from interested motives, to abandon parts of the specified line, and thereby to deprive the inhabitants of particular towns or districts of the benefit which was intended for them.

The interest of shareholders is not considered in this particular mandamus; but I may here observe, that, as to the shareholders, the Company may contract an obligation to complete a Railway which they have begun; for not only have all the shareholders a common interest that the undertaking should be completed, but particular classes of them may have taken shares and paid calls, with a view to the railroad coming to their localities; and they would be very much aggrieved if only a part of it were constructed, from which they would receive no accommodation. Is it not, then, the duty of the Railway Company to complete the line specified in their Act of Parliament, they having represented to the legislature that the making of the whole of it "would be attended with local and public advantage," and that they were willing to make the whole; and they having obtained from the legislature the powers, which they have partially used, on the faith of these representations. It is to be presumed, that they have the means of performing this duty, for they have likewise represented to the legislature that the funds which have been subscribed, and which they are enabled to raise, are sufficient for that purpose.

The next question is, if they are able, and refuse, ought they not to be compelled to do their duty by a writ of mandamus? It is only necessary to observe, that there is no other adequate remedy. Suppose that an action would lie against the Company at the suit of a landowner, whose land has been taken from him by the Company and not used for the purpose of a Railway, or because the Railway, which ought to go several miles farther to a neighbouring town, is left unfinished at the boundary of his estate or any where short of the town, he could only recover damages, without any specific relief. Again, if

is clearly the appropriate remedy. We are in the habit of granting writs of mandamus to Railway companies to do what is necessary for granting compensation for land which they take, or which is injuriously taken by their works, and to do other acts according to the law imposed upon them; and no distinction can be made between these and the act of constructing a part of a railway, if their duty so requires. Suppose there was an Act of Parliament obtained in the usual form for making a Railway from the town of A. to the town of B., the distance being ten miles, the intervening land all belonging to X. and Y., and the Company, having got possession of the requisite quantity of land under the compulsory clauses of their Act, had actually completed the railway and opened it to the public, and then, resolving to abandon it, removed the rails, leaving the mounds and cuttings remaining, would not this Court, on the application of X. and Y., grant a mandamus to the Company to reinstate it? For this, *The King v. The Severn Railway Company* (a) is expressly in point, and of authority which has never been questioned. Suppose that the Company I have imagined had made the railway for two thirds of the line between A. and B., and then refused to go farther, can there be the smallest doubt that Lord Tentorden, Mr. Justice Bayley, and Mr. Wigram on the same principle would order the same?

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sion, been applied for to complete the Railway from Market Weighton to Beverley; for part of the lands of the two applicants had been taken by the Company, and other parts were liable to be taken. There would have been a duty on the Company to complete the line; and Mr. Burton and Mr. Leaing, being sufferers by the breach of that duty, would have been entitled to the mandamus; surely they are equally entitled to it, although it does not include the space between Cherry Burton and Beverley, as the space between Market Weighton and Cherry Burton is part of the line which the Company undertook to complete, and their powers of compulsory purchase respecting it were still in full force when the mandamus issued.

Although, as yet, there has not been any solemn determination that a mandamus will lie to complete a Railway, there are many authorities to support the doctrine that there is a contract, duty, or obligation, on which the mandamus rests.

I begin with *Rex v. The Birmingham Canal Navigation* (a), in which Commissioners, being empowered to make a canal from a place called New Hall Ring to Birmingham, instead of beginning at New Hall Ring; began in another part of the line; and, according to the marginal note, "mandamus to execute one part of a power granted by Act of Parliament first, denied." Lord *Mansfield* said, "there must be a strong case made to warrant such a mandamus. The present is a very weak one." The Reporter, who is not always accurate, imputes these farther words to Lord *Mansfield*: "The Act imports only an *authority* to the proprietors, not a *command*. They may desert or suspend the whole work, and à fortiori any part of it?" But *Willes* and *Blackstone* thought the application premature; that the Court ought not to grant a mandamus to compel them to cut to New Hall Ring first. But if, from sinister views, the Commissioners refused

(a) 2 Wm. Bl. 708.

union that at last the Company might be compelled to complete the undertaking. I then
the well-known passage in Lord Eldon's celebrated
nt in *Blakemore v. The Glamorganshire Canal Com-*
). We are told that his language is inapplicable,
he was there dealing with an application for an
ion; but the principle he lays down is equally ap-
e wherever rights and obligations are to be deter-
upon the construction of such Acts of Parliament,
r the application be in a Court of equity for an in-
n to prevent that from being done which is forbid-
in this Court for a *mandamus* for the performance
ty which the law imposes. He says, "when I look
hese Acts of Parliament, I regard them all in the
f contracts made by the legislature on behalf of
person interested in any thing to be done under
and I have no hesitation in asserting, that unless
inciple is applied in construing statutes of this de-
n, they become instruments of greater oppression
ny thing in the whole system of administration un-
r constitution." "The parties are obliged to submit
contract which the legislature has made for them.
sult is, that the contract shall be carried into exe-
and the King's subjects are compelled to submit to
n the notion that it will be for the public good; but
re not compelled to submit to any thing, except

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very nearly thirty years, as often as the subject has been discussed; and it is wholly unnecessary to go through the long list of cases which have been cited in argument to prove that it has been so recognised and acted upon.

We have only to ask, then, whether the two applicants were interested in what was to be done under the Acts of Parliament for making the line of Railway from York to Beverley; and whether the Company must not be considered, when taking their land under these Acts of Parliament, to have contracted with them to complete the line for the three miles and a half between Market Weighton and Cherry Burton? I cannot doubt that there is such a contract between the Company who acquire lands under such an Act of Parliament and the owner of the lands, that the Company will apply the land to the purposes of the Railway and complete the line. If so, a mandamus should issue to enforce it.

Such is the view of the subject which was taken by Lord Denman, Mr. Justice Littledale, Mr. Justice Patteson, and Mr. Justice Williams, the Judges of this Court in 1839, when, in the case of *The Queen v. The Eastern Counties Railway Company* (a), a mandamus to complete a Railway was first applied for; and although this is not a conclusive authority, because, for want of an averment that the Company had abandoned the design to complete the Railway, a peremptory mandamus was not awarded, it is entitled to much weight. When the return was discussed, all the arguments against the mandamus, which could suggest themselves to the subtle mind of Sir William Follett, and which were repeated at the bar in the present case, were brought forward, and Lord Denman, after enumerating them, says (b): "We think it right so far to advert to these remarks, that we may wholly disavow them as having at all conduced to the judgment which we are about to pronounce." "We shall keep our minds open for the discus-

(a) Ante, Vol. 1, p. 509; 10 A. & E. 531. (b) 10 A. & E. 567.

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sion of all such doubts on every proper occasion; but we do not yield to them; nor is it necessary to advert to them in coming to our present decision. We neither hold the Court incompetent to enforce execution of an Act under the circumstances disclosed to us in the affidavits, nor think any of the reasons which have been enumerated are conclusive against making our mandamus peremptory." He afterwards points out the fatal defect: "The rule was made absolute, and the writ was directed to go, on the supposition that they had no intention to proceed bonâ fide with their works, and had, on the contrary, abandoned all intention to complete them. But the prosecutors of the writ have stated no such facts." "We can infer no fault; it must be distinctly charged, and the charge, as it stands, is quite insufficient, and falls decidedly below the case which we thought was made reasonably probable by the affidavits on both sides." This is the ground on which judgment was given for the defendants; and although it was expressly said that these points were to be open to argument hereafter, there seems reason to believe, that if the abandonment of a part of the line had been sufficiently averred, a peremptory mandamus would then have been awarded. I may likewise observe, that, in the case of *Anstruther v. The East of Fife Railway Company* (a), upon appeal to the House of Lords from the Court of Session in Scotland, the present Lord Chancellor, Lord *St. Leonard's*, intimates a pretty clear opinion, that, if a Railway Company have taken land under the compulsory powers conferred upon them, and have begun to make the Railway, they are not at liberty to abandon it.

Assuming, that, for these reasons, and on these authorities, this mandamus has lawfully issued, and is good upon the face of it, I now proceed to examine the return which the defendants have made to it. They mainly rely upon their statement, that, of the line from York to Beverley, the

(a) 19 Law Times, 13; 1 Macq. Scotch App. Cas. 98.

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prosecutors and the public were entitled, under the Act of Parliament, to still greater advantages than they will enjoy when this mandamus shall be obeyed, it seems strange that the Company should be permitted to allege their own wrong as a reason for withholding what is now claimed, and what may now be easily perfected.

The Company next allege, that the portion of the line described in the mandamus would not be remunerative to the Company. This is very likely to be true, or it would have been completed and opened long ago. But no one can gravely contend, that a Company, having obtained powers to make a long line of Railway, may, at their pleasure, make the parts of it which may be profitable, and abandon the rest. Nor need I do more than repeat the futile language which follows, "that the making of the same Railway would be a useless expenditure of labour and money, whilst it would be destructive of the lands through which it would go for any agricultural or other useful or beneficial purpose." It was hardly contended, that an issue could be taken upon such an allegation; and it was hardly denied, that, although the making of a particular portion of the Railway may not be profitable to the Company, it may be of great benefit to particular individuals and to the public that the whole should be completed.

I have only further to notice the allegation of want of funds, "that all and every the sum and sums of money applicable to the purposes of the said Act, which can, in reasonable probability, come to the possession of or be disposable by us the said Company, will fall short, by a very large sum of money and not less than 100,000*l.*, of the aggregate sum necessary for the making of the Railway authorised by the said Act, and which we, the said Company, are by the annexed writ commanded to make." I am not exactly sure how far this part of the return is meant to be relied upon; for the *Solicitor-General*, in arguing the question, whether such an Act of Parliament only gives a permission or imposes an obligation, insisted

that, if there were an obligation, want of funds would be no defence.

Upon an application for a mandamus to complete a Railway, were it clearly made out to the satisfaction of the Court, that the Company, although carrying out the design with good faith and with prudence, was, from unforeseen casualties, left entirely without funds, I make no doubt, that, in the exercise of our discretion, we should refuse the application, and leave the parties to such relief as they might obtain by the interposition of the legislature; and I am not prepared to say, that, a mandamus having issued, there might not be a return of an absolute exhaustion of funds and an impossibility of raising any, so framed as to amount to an answer. But I am quite clear that this attempt at alleging a want of funds is wholly abortive. The defendants do not say that they have not funds in hand which would be sufficient to enable them to do all that they are commanded to do, which is to complete the line from Market Weighton to Cherry Burton, but they merely allege, that, in reasonable probability, they may not have funds for all the purposes of the Act of Parliament. Upon such a reasonable probability the prosecutors could not have taken any issue capable of being tried. I think they did well in demurring to the whole return, for, in my opinion, it affords no answer to the mandamus, either by any separate allegation or by its multifarious allegations taken in conjunction.

I most heartily rejoice that these questions are upon the record, and that they may be carried to the Court of last resort. In the meantime, agreeing in opinion with my Brother *Crompton*, I must pronounce the judgment of this Court to be for the prosecutors, and award a peremptory mandamus (a).

Judgment for the Crown (b).

(a) His Lordship stated, that this judgment had been read by *Crompton, J.*, who concurred in it.

(b) A writ of error is now pending on this judgment.

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When a Railway Company avail themselves of extraordinary powers conferred upon them at their own solicitation, and on their own representations that the projected Railway will be of public benefit, by getting possession of lands without the consent of the owners, and beginning the formation of the Railway, there is a duty incumbent upon them to complete the undertaking; and the Court will compel the performance of that duty by mandamus, at the instance of a landowner.

The moment the Act receives the Royal Assent, a contract and obligation attach, though the Act merely enacts, that "it shall be lawful" for them to make the line; and by the legislature alone can that contract and obligation be discharged.

MANDAMUS.—The writ, which was tested the 8th of May, 1852, stated, that, by 8 & 9 Vict. c. xxxix., the Huddersfield and Sheffield Junction Railway Act, 1845,—after reciting that a Railway from Huddersfield to Penistone, there to form a junction with a branch to the town of Holmfirth, would be of great public advantage; and that the persons thereafter named were willing, at their own expense, to carry such undertaking into execution, but the same could not be effected without the authority of Parliament—it was enacted, that certain subscribers should be united into a Company for making and maintaining a Railway from Huddersfield to the Sheffield &c. Railway, together with a branch therefrom to the town of Holmfirth, to be incorporated by the name of the Huddersfield and Sheffield Junction Railway Company; that, by 9 & 10 Vict. c. cclxxvii., that Company was incorporated with the Manchester and Leeds Railway Company; that, by 10 & 11 Vict. c. ciii., The Manchester and Leeds Railway Act, 1847, after reciting, among other things, that "it was expedient that the Manchester and Leeds Railway Company should be empowered to make and maintain an extension" of the said Holmfirth Branch thereafter described, and that "The Manchester and Leeds Railway Company were willing, at their own expense, to undertake such works;" and that it was expedient that some of the powers and provisions contained in the Acts therein recited should be altered: it was enacted, that all the pow-

s, provisions, matters, and things contained in any of the therein recited Acts, with regard to the use of the railways by the said Acts authorised to be made, and to the raising of money by shares, mortgages, or otherwise, and to the shares created under the powers thereof, and all other powers and provisions contained in any of the recited Acts, except such as were repealed or altered by the Lands, or the Railways, Clauses Consolidation Act, or any other Act, or had expired by effluxion of time, should, as far as applicable, extend to that Act, and to the use and protection of the Railways thereby authorised to be made, and to the money to be raised by shares and mortgages or otherwise for the same, and to the shares created under that Act, and, generally, should operate and be in force in reference thereto, as fully and effectually as if re-enacted and re-enacted in that Act; and that the Lands, and Railways, Clauses Consolidation Acts should be incorporated with it. And it was further enacted, after reciting that the estimated expense of making the works authorised by the Act was 56,000*l.*, that it should be lawful for the Company to raise by creation of shares an additional capital of that amount, such capital to be considered as forming part of the general original capital authorised to be raised by them under the recited Acts; and it was further enacted, that, after the whole capital authorised by the Company's Acts to be raised by shares should have been subscribed, and one-half paid up, it should be lawful for them to borrow on mortgage an additional sum, not exceeding 18,600*l.*; and, after further reciting the deposit of plans and sections of the proposed extension Railway, with the books of reference containing the names of the landowners, it was enacted, that, subject to the provisions of that Act and of the Lands, and Railways, Clauses Consolidation Acts, it should "be lawful for the Company to make and maintain the said extension Railway in the line and upon the lands delineated on the

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said plans, and described in the said books of reference, and according to the levels defined on the said sections, and to enter upon, take, and use such of the said lands" as should be necessary for such purposes; and that, after the expiration of five years from the passing of that Act, all the powers thereby granted to the Company for making and executing the said extension Railway and works, or otherwise in relation thereto, should cease to be exercised, except as to so much of the same as should then be completed.

That, by 10 & 11 Vict. c. clxvi., the Manchester and Leeds Railway Company were incorporated, by the name of "The Lancashire and Yorkshire Railway Company," and by that name were to have all the lands, powers, rights, and privileges, which had before been or should be vested in the Manchester and Leeds Railway Company, together with certain Railways belonging to the said Company (including the said Huddersfield and Sheffield Junction Railway). That the defendants had, under the 11 & 12 Vict. c. 3, applied for an extension of time to the Railway Commissioners; who had, by a warrant, dated the 23rd of June, 1848, ordered, that the time limited by the 8 & 9 Vict. c. xxxix., and the time limited by the 10 & 11 Vict. c. ciii. for the completion of the extension Railway, should be extended for the further period of two years. The writ then stated, that the defendants had made the Huddersfield and Sheffield Junction Railway, and also the branch Railway to Holmfirth, but had not done or taken any acts or steps, either as to the purchase of lands or otherwise, for making or completing, or commencing to make or complete, the said extension Railway, authorised to be made by 10 & 11 Vict. c. ciii.; that the making and completing of the said extension Railway would be of great public advantage, and especially to the inhabitants of the district through which the same, if made, would pass, and which district is a large and populous manufacturing district; and that the

said extension Railway, if made pursuant to the Act, would pass through parts of the townships of Wooldale and Cartworth; and that the whole of the lands necessary for making the said extension branch Railway, and the works to be connected therewith, were situate in those townships; and that the length of the said proposed extension branch Railway was one mile and seven furlongs, or thereabouts. That George Hinchcliff was owner of lands in the township of Cartworth, through which the said extension line was authorised to be made and pass; and that the said lands were shewn on the plans deposited with the clerk of the peace, and the name of the said G. Hinchcliff was contained in the books of reference; that the said G. Hinchcliff was desirous that the said extension Railway should be made and completed, pursuant to the said statutes in that behalf; that a reasonable time for the defendants to have made and completed the said extension Railway had long since elapsed; and that the defendants had abandoned all intention to make and complete the said extension Railway, or any part thereof; that the said G. Hinchcliff had required them to make and complete the Railway, which the defendants had refused and neglected to do, or to take any steps for that purpose, either by the purchase of lands or otherwise. The writ then commanded the defendants, immediately after the receipt thereof, to do and take all necessary acts and steps, both as to the purchase of lands and otherwise, for making and completing and to make and complete the said extension Railway, or to shew cause to the contrary.

The return, admitting the truth of the allegations stated in the writ, submitted that the defendants were not bound or liable by law, nor ought they to be required, to do and take all necessary acts and steps, both as to the purchase of lands and otherwise, for making and completing and to make and complete the said extension Railway, as by the said writ required.

Demurrer and joinder.

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The *Attorney-General* (Sir *F. Thesiger*), with whom was *J. Addison*, for the Crown.

The *Solicitor-General* (Sir *F. Kelly*), with whom was *Tomlinson*, for the defendants.

The argument is omitted, as it is so fully stated in the judgment. The following authorities were cited: *Reg. v. Barlow* (a), Com. Dig. Parliament, R. 22, *Reg. v. St. Saviour's, Southwark* (b), *Rex v. Havering-Atte-Bower* (c), *M' Dougall v. Paterson* (d), *Blakemore v. The Glamorganshire Canal Company* (e), *Cohen v. Wilkinson* (f), *Reg. v. The Eastern Counties Railway Company* (g), *Rex v. The Severn and Wye Railway Company* (h), *Lee v. Milner* (i), *Anstruther v. The East Fife Railway Company* (k), *Doe d. Payne v. The Bristol and Exeter Railway Company* (l).

Cur. adv. vult.

Nov. 16th.

The judgment of the Court was now delivered by

LORD CAMPBELL, C. J.—After long and anxious deliberation, I have come to the conclusion that we are bound in this case to pronounce judgment for the prosecutors. Where the directors of a Railway Company have actually availed themselves of the extraordinary powers conferred upon them at their own solicitation, and on their own representations, by getting possession of lands without the consent of the owners, and beginning the formation of a Railway, which necessarily interferes with public as well as private rights, I have never been able to bring myself

(a) 2 Salk. 609.

(b) 7 A. & E. 925.

(c) 5 B. & Ald. 691.

(d) 21 L. J., C. P., 27.

(e) 1 My. & K. 154.

(f) Ante, Vol. 5, p. 741; 18 L. J., Chanc., 411.

(g) Ante, Vol. 1, p. 509; 10 A. & E. 531.

(h) 2 B. & Ald. 646.

(i) 2 M. & W. 824.

(k) 1 Macq. Sc. App. Cas. 98.

(l) Ante, Vol. 2, p. 75; 6 M. & W. 320.

to doubt that there is a duty incumbent upon them to complete the undertaking, and that we are empowered to compel the performance of this duty by mandamus. Whether, where the Company have done nothing, as between themselves and third parties or the public, under their Parliamentary powers, they may not wholly abandon the undertaking, is a very different question. I was at first inclined to think, that, till they have actively interfered with private or public rights after the passing of their Act of Parliament, they are not to be considered as having entered into any contract, or incurred any obligation to execute the undertaking. Neither individuals nor the public necessarily suffer any severe injury by the scheme having been formed and repudiated; and neither the consideration nor the promise, which constitute the contract or obligation, can be said to be so apparent, if the shareholders agree to dissolve the Company as soon as the Act of Parliament has passed. But my present opinion is, that, at the moment when the Act receives the Royal Assent, the contract and obligation attach, and that by the Legislature alone can the contract and obligation be subsequently discharged. There is great difficulty in drawing any other line. The notion, that, upon the passing of the Act, there is a *locus poenitentiae* still allowed to the Company, is rather a gratuitous supposition; and I know not on what principle we are to interpolate the condition, "if the Company avail themselves" of the extraordinary powers, which they have obtained upon a declaration that they were ready and willing, at their own expense, to execute a work declared by the legislature to be greatly for the public benefit. Regarding the transaction as matter of contract, we may well conclude, that, between the Company and the owners of the land to be taken for the Railway, as well as with the public, the contract is absolute when the Act passes. There is ample consideration in the prejudice which the landowners sustain in being sub-

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ject to a liability for a certain number of years to have their land forcibly taken from them, and in the benefit thereby accruing to the Company. The reciprocal consideration flowing from the Company is the expenditure which they are to incur, and the benefit they are to confer, by making and completing the Railway. The mutual consents are given through the medium of the legislature.

It was argued at the bar, that these Acts of Parliament only give a permission to the Company, because the powers are limited to a certain number of years; but this limitation seems manifestly to be introduced for the protection of the landowners, without giving the Companies the power at their pleasure to abandon their undertaking. For the landowners there is no *locus pœnitentiæ*. From the instant the Act receives the Royal Assent the Company have the compulsory power of purchasing all the lands required by them throughout the whole extent of the Railway, as specified in the books of reference; and by serving a notice they may become the actual purchasers at any moment, till the long period to which the compulsory power of purchase is limited expires. Till then the landowners are deprived of their full rights of ownership. And if they are not to be compensated by the construction of the Railway, they would in many cases sustain a serious loss. During all the time while the compulsory power of purchase subsists, they are prevented from alienating land or houses described in the books of reference, and from applying them to any purposes inconsistent with the claim which may be made to them by the Railway Company. During the whole of this time, is one party to the contract to be bound, and the other to be free? Then, may not the public be considered a party to the contract; and will not the public be aggrieved if the contract may be repudiated by the Company at any time before it is acted upon? The fact is agreed, that it would be for the public benefit that a new line of communication should be

opened between certain termini; and the privilege of making it is conceded to a Company with extraordinary powers over highways and other public rights. Competitors who were willing to construct a Railway between the same termini are defeated; for a period of at least five years, no similar scheme can be brought forward.

May it not reasonably be concluded, then, that the Company are bound to perform their part of the contract as well in respect to the public as to the landowners? A permission which works no prejudice to the party who grants it may well leave the exercise of it optional with the grantee; but if it is granted at the request of the grantee, on a representation that he is about to exercise it for the benefit of the grantor, who cannot withdraw it, is it not the fair inference, that the obligation is reciprocal?

Rash and reckless speculators in railroad shares may thus be considerable losers, if, when the shares suddenly fall to a discount, they may not at their pleasure break up the concern; but if a speculation of this sort is conducted on fair commercial principles, no real hardship can arise from considering that the contract binds the Company as well as the landowners and the public. The Company always declare their readiness and willingness to execute the work for the public benefit, and engage to find funds for the purpose. If the calculations have been honestly and prudently made, there is hardly a possibility of any discovery, before the work is begun, that it may not be advantageously carried on. If in the progress of the work unforeseen difficulties arise,—if a tunnel costs much more than might reasonably have been expected, or bridges are swept away by an inundation,—a new arrangement may be made under the sanction of Parliament. Applications have repeatedly been made with success to Parliament by Railway Companies, for leave to abandon the whole of their undertaking or a particular branch of it; I cannot therefore allow, that the apprehended ruin of shareholders

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should induce us to abstain from giving such Acts of Parliament the construction which ought fairly to be put upon them. We are to find out what is the just inference from the nature of the transaction, and from the language employed. In some of these Railway Acts we find the expression "the Company is required to make and maintain the Railway;" in others, "it shall be lawful for the Company to make and maintain." I do not believe that a different meaning is really intended by these different expressions. The rule for construing the language of Parliament upon this subject is to be found in Com. Dig. "Parliament" R. 22: "Words of permission shall be obligatory. If a statute says, that a thing for the public benefit may be done, it shall be construed that it must be done." According to this rule, as the Railway is expressly declared to be for the public benefit, these two forms of expression in Acts of Parliament for the same object are synonymous. Reliance was placed by the defendants' counsel on *Anstruther v. East of Fife Railway Company* (a); but when that case is examined, it will be found to be no authority for them. There the special Act received the Royal Assent on the 16th of July, 1846; the Company, having received deposits and calls, but before commencing any works or giving any notices to landowners, on the 28th of March, 1849, came to a resolution to abandon their undertaking, and to apply to Parliament for an Act to authorise them to do so. On the 30th of May following, the appellant made an application to the Court of Session in due form, "that the Company might be interdicted from taking any steps or proceeding, having for their object the dissolution of the said Company, and from returning or paying back to the shareholders the money advanced and paid by them in the shape of deposits or calls, and from violating the contract or agreement entered into between him and the Company,

(a) 1 Macq. Scotch App. Ca. 98.

and from acting in any other way prejudicial to his interests under the said contract or agreement, or contrary to the provisions of the statute incorporating the said Company. The appeal was against interlocutors refusing this interdict. The appellant's counsel admitted that the interdict would have prevented the Company from coming to Parliament for an Act authorising them to abandon the undertaking; but relied upon the very questionable dictum laid down by Lord *Cottenham* in a case (a) where the Company had begun to make the Railway, that the Court of Chancery may grant an injunction to stop proceedings in Parliament contrary to a contract supposed to have been entered into. It further appeared, that the appellant had brought an action of declarator against the Company, for the purpose of having it found that the Company had no right to abandon the undertaking, and that in this action judgment had been given against him. Lord *St. Leonard's*, therefore, in advising the House to dismiss the appeal, observed (b), "What is prayed is a general injunction, on the assumption that the right will be established, at the very period when that right has been denied, and the injunction in effect dissolved by a judgment against the appellant in an action of declarator," (not now before the House).—"The appellant prays that the Company may be prevented from asking Parliament for an Act to put an end to this proprietary. It is perfectly clear that the terms in which the injunction is sought, would go to interdict such an application." "If such a person desires to oppose a projected measure in Parliament, he is at perfect liberty to do so; and he will be duly heard by the legislature on the ground of his interest; but, to grant an injunction in the circumstances of the present case, is impossible." His Lordship afterwards goes on to observe, that, to support

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(a) *Heathcote v. The North Staffordshire Railway Co.*, Ante, Vol.

6, p. 368; 2 Mac. & G. 100.

(b) 1 Macq. Sc. App. Ca. 104.

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the appeal, the propriety of the interdict in all its parts, as prayed, must be proved; and that there was no pretence for saying that the appellant had any right to restrain the Company from paying back deposits to the shareholders. The affirmance of the judgment refusing the interdict is no authority against this mandamus.

The question which is now before us is more nearly touched by the action of declarator in the Court of Session between the same parties. There, a very learned Judge, Lord Wood, decided that the action was not maintainable; but he proceeded solely on the ground that it had been commenced too late; and that an Act had been passed by the legislature, authorising the Company to abandon the undertaking. He says, "the compulsory powers authorising the Company to take lands expired in July, 1849; in 1850 they applied to Parliament for leave to dissolve themselves; and, having proved to the satisfaction of the legislature that the construction of the Railway had never been commenced, and that it was expedient to abandon the undertaking, a bill passed, enacting that the Company should cease to exist, except for payment of its debts; and that the Company were absolutely released and discharged from all obligation and liability to make the Railway."

The action of declarator was instituted *before* the passing of the dissolving statute, but not till *after* the compulsory powers of taking land under the original Act had expired, so that the pursuer was clearly too late in bringing his action. His Lordship, however, goes on to intimate a pretty strong opinion, that, "had the proper demand been made while the compulsory powers subsisted, and within a reasonable time before their cessation, an action for that purpose *timeously* raised would have been maintainable by the pursuer; and he might have been entitled to the decree now prayed against the defenders (a).

(a) See the authorities collected, 1 Macq. Scotch App. Ca. 102, n.

Looking at the 10 & 11 Vict. c. ciii., for making this extension by an existing Company, which had previously made the line of Railway to be extended, I doubt whether the Company, in respect of the extension, be exactly in the situation of a new Company which had been created to construct a new Railway, and which had never availed itself of any of the powers of the Act. But supposing the defendants to be in this situation, I think that the return to the mandamus would be bad, as only shewing that they had broken the contract, and disregarded the obligation to construct that Railway, which they are commanded to complete.

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I have now to make a few observations on the form of the mandatory part of the writ, which is said to command what is unlawful, by requiring the Company "to do and take all necessary acts and steps both as to the purchase of lands and otherwise, for making and completing, and to make and complete, the said extension Railway pursuant to the statutes in that behalf." Under the 4th and following sections of the Act, 10 & 11 Vict. c. ciii., power is given to raise a sum of money by the creation of new shares for making this extension, and likewise to borrow on mortgage. If this money ought to have been raised by new shares or mortgage, before the Company proceed to purchase land under their compulsory powers, this writ requires them to do so. We must assume that they can have no difficulty in performing their undertaking. On arguing this objection we must assume that an obligation upon the Company exists to execute the work, and to do all that is necessary for this purpose. They are in substance called upon to take all the steps necessary for the completion of the Railway, in the order which the Act of Parliament prescribes.

Upon the whole, it appears to me that the writ of mandamus is valid in form as well as in substance; and, the only return to it being, that the Company, having taken

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no steps towards the making of the Railway, are not bound to take any, I think there ought to be judgment for the prosecutor, with the award of a peremptory mandamus. The case is certainly one of the most important ever argued in Westminster Hall, and it is attended with considerable difficulty. I therefore earnestly hope, that, as speedily as possible, it may be brought by writ of error before a superior tribunal (a).

COLERIDGE, J.—I am of the same opinion; and, as I have had the opportunity of reading and considering attentively both the judgments of my Lord, now delivered, it is scarcely necessary for me to add more than my concurrence in the conclusion to which he has come, and, speaking generally, to the arguments and view of the authorities by which he has been led to it, I should merely waste time in an attempt to repeat the former or re-examine the latter. In the case now for decision, it seems to me perfectly clear, that if the writ discloses a *prima facie* case on which it can be supported, the return alleges nothing whatever to displace that case. The return can be no answer, unless this can be maintained, that the defendants may, by a representation to the legislature, of which they are called on to prove the truth, that it will be a great public benefit that a Railway should be constructed through a particular district and by a particular line, and that they are willing at their own expense so to construct it, procure from the legislature all necessary powers, and most stringent they are, for that purpose; that by these powers they should at once, and for the whole number of years specified by the Act, take from the landowners on the line the free use of their property, impede all improvements, prevent all sales; that they

(a) A writ of error has been brought, and is now pending. His

Lordship stated that *Crompton*, J., concurred in this judgment.

should indirectly, but effectually, prevent the district from the admitted benefit of having a Railway constructed by other parties; and yet that they, having thus procured the powers, given the undertaking, and occasioned the inconvenience above stated, may simply do nothing, retaining however all their powers for the time specified. In this case the defendants allege no inconvenience—no impossibility of making the line—no want of funds, means, or time; so that the bare and single circumstances of their having done nothing is relied on to relieve them from the obligation of doing anything. The very statement of these circumstances seems to me sufficient to shew how entirely impossible it is to sustain this return.

The real question then is on the writ; and after much consideration and some hesitation, I am of opinion that it discloses a sufficient legal right in the individual promoting it, and a sufficient obligation on the defendants, to render it valid. It alleges that the whole of the projected line would pass through the townships of Wooldale and Cartworth; that Mr. Hinchcliff was and is owner of lands in Cartworth, through which the line will pass; that these lands are shewn on the plans, and his name included in the books of reference; and that he is desirous the line should be made. He is therefore not merely interested as one of the public in the general benefits to result from the projected line—he is not merely one of the public on whose behalf the contract has been made for the construction of the Railway, but individually he has been affected in his property by the acts of the defendants. Ever since the statute passed at their instance; they have exercised a control over his lands, and he has been impeded in improving them, and substantially prevented from selling them. The only recompense for this is the specific performance of that which was originally contemplated by the parties, and intended to be provided by the legislature; none other would be complete; and to this

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he has a legal right. I therefore agree with my Lord, that our judgment should be for the Crown.

ERLE, J., stated that he adhered to the opinion which he had given in *Reg. v. The York and North Midland Railway Company (a)*, but delivered no judgment.

Judgment for the Crown.

(a) The preceding case.

COURT OF COMMON PLEAS.

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Nov. 25th.

LITTLE v. THE NEWPORT, ABERGAVENNY, AND HEREFORD RAILWAY COMPANY.

Under the 13th & 15th sections of the 8 Vict. c. 20, where a tunnel is marked on the deposited plans of a Railway, there can be no deviation within the limits of deviation, unless the land-owner consent; but the tunnel must be made at the spot indicated: and if the Company deviate where they ought not, no special duty is imposed upon them to make a tunnel on the deviated line.

THIS was an action on the case, brought by order of the Lords Justices of appeal in Chancery, against the above Company, for having constructed their line within the limits of deviation otherwise than by a tunnel. The pleadings, which it is unnecessary to set out, raised the simple question, whether, on a line of Railway deviated within the limits of deviation, a Railway Company can legally deviate where a tunnel is shewn on the deposited plans.

At the trial, before *Jervis*, C. J., at the London Sittings after Trinity Term last, the plaintiff had a verdict on the material issue, leave being reserved to the defendants to move to set aside that verdict, and instead thereof to enter the verdict for the defendants.

A rule having been obtained accordingly,

Crowder, Byles, Serjt., *Barstow*, and *M. A. Shee* shewed

(a). The question raised depends upon the construction of the 13th and 15th (b) sections of the 8 Vict. c. 'Deviation' is mentioned generally in the 15th section and the meaning is, that where the line is deviated, it must be with all its incidents, and where a line is marked on the plans, and the line is deviated, also a tunnel must be made. [*Maule, J.*—If the defendants are bound to make a tunnel as marked on the plans, the plaintiff cannot say that they are bound also to deviate on the deviated line; and if the true construction of the Act be, that, when a tunnel is marked on the plans, the Company cannot deviate, then the plaintiff is entitled to recover. The 8 Vict. c. 20 is not intended to apply to all cases, but assumes, as to particular Railways, that there will be special Acts containing provisions relative to the ground through which the line will go.

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Before *Jervis, C. J., Maule, Williams, J., and Talfourd, J.*
 Sect. 13. "Where in any Act it is intended to carry a railway on an arch or viaduct, or other viaduct, as shown on the said plan or section, the same shall be made accordingly; and where a tunnel is marked on the said plan or section as intended to be made in any place, the same shall be made accordingly, unless the Act, lessees, and occupiers of the land in which such tunnel is intended to be made shall consent that the same shall not be made."

Sect. 15. "It shall be lawful for the Company to deviate from the line delineated on the plans so long as the deviation is not more than ten yards from the said line; and that the Railway, by means of such deviation, be not made to extend into the lands of any person, whether owner, lessee, or occupier, whose name is not mentioned in the books of reference, without the previous consent in writing of such person, unless the name of such person shall have been omitted by mistake, and the fact that such omission proceeded from mistake shall have been certified in manner herein or in the special Act provided for in cases of unintentional errors in the said books of reference."

violation delineated upon the said plans, nor to a greater extent in passing through a town, village, or lands continuously built upon, than ten yards, or elsewhere to a greater extent than one hundred yards from the said line; and that the Railway, by means of such deviation, be not made to extend into the lands of any person, whether owner, lessee, or occupier, whose name is not mentioned in the books of reference, without the previous consent in writing of such person, unless the name of such person shall have been omitted by mistake, and the fact that such omission proceeded from mistake shall have been certified in manner herein or in the special Act provided for in cases of unintentional errors in the said books of reference."

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The necessity of a tunnel varies according to the nature of the country through which the line passes, and is a fit subject for legislation in the particular Act. This construction is favourable to the landowners' rights, and also to the construction which I think we ought to give to the 15th section. It might be that a tunnel, laid down on the plans, was to go through a hill, and that there might be such a deviation that no tunnel could be made, or that a tunnel might thereby be unnecessary. We must look at the 13th and 15th sections together, and see whether, where a tunnel is marked on the plans, and a deviation is made, rightfully or wrongfully, a tunnel must be made on the deviated line.] If the Railway Company deviate in any case, it must, it is submitted, keep to a tunnel if marked on the plans.

Watson, Sir T. Phillips, and Rochfort Clarke, contra, were not heard.

JERVIS, C. J.—The question on this record is, whether, on a line of Railway deviated within the limits of deviation, a Railway Company can properly deviate where a tunnel is shewn upon the deposited plans; and I am of opinion that they cannot. That question necessarily arises, for if the Company cannot deviate where a tunnel is shewn,—deviating, they are not bound to make a tunnel, as has been pointed out in the course of the argument by my Brother *Maule*. In reason and sense there is nothing against the construction which the words plainly warrant: the viaduct, arches, and tunnels, which are mentioned in the 13th section, and in respect of which there is a specific restriction in the 14th section, are matters of great importance, both to the public and to landowners, and could not be expected to be made the subject of provision in a Railways Clauses Act applicable to all railways, but should be specifically provided for by contract between the parties,

or, in the absence of contract, by legislative provision embodied in the special Act. Therefore, in any place where a tunnel was delineated on the plans, it might be consistent with the provisions of the general Act, that the special Act should contain a provision, either to transpose the tunnel if the Company deviate, or to make no tunnel at all. There is nothing in the Act, or in the subject matter with which it deals, which calls for a construction other than that which is warranted by the exact words of the Act; for it is not intended to be a governing Act for all Railways, it is the basis of a general enactment, to be qualified and limited by a special Act in each separate case. That being so, we are bound to put such a construction upon the words as they may fairly warrant, and we are not bound to strain or vary the plain meaning of the words. The 13th section is remarkable, as drawing a distinction between viaducts and works of that description and tunnels; for a tunnel can be dispensed with by consent, whereas a viaduct cannot, according to the legislative meaning of the words. In substance, it provides, that where a tunnel is marked on the plans or sections as intended to be made at any place, the same shall be made accordingly; and the fair and liberal meaning of that is, that where, on the line, a tunnel is shewn, there, at that place, the tunnel shall be made, not within the limits of the line of deviation, but at that particular spot; and if a viaduct is shewn on the plans, it shall be made where it is shewn. That that is the meaning of the 13th section, no one who reads the 14th section can doubt; for it says, it shall not be lawful for the Company to deviate or alter a tunnel shewn, unless in particular cases. Can any one doubt that a man, substantially, does deviate as much in the tunnel as he does in the line, if he deviates ninety feet or ninety yards? and certainly, a person alters the tunnel if he does not put it in place A., but on the side, at place B. It is not then the same tunnel. I think, therefore, it is plain, that

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when there is a tunnel shewn on the plans at a certain place, there the tunnel must be made, and that there must be no deviation or alteration in the position of it. If that be so, the 15th section must be read with the 13th section: "It shall be lawful for the Company to deviate from the line delineated on the plan deposited, within certain limits, except where on the line a tunnel is shewn on that place, and there the tunnel shall be made in that place." In that way, the 13th, 14th, and 15th sections together make a comprehensive and intelligible system, providing that, where viaducts or tunnels are shewn, in that place they shall be put, and not varied or altered; but, with that exception, the line may deviate 100 yards, according to the deviating line shewn on the plans. There is no hardship on the Company in this, or on the landowner; it gives him the exact thing shewn on the plan. Both parties, therefore, are justly protected, and no injustice is done; and it seems to me the words of the Act compel us to arrive at that conclusion. The verdict, therefore, must be entered for the defendants.

MAULE, J.—I am of the same opinion. In dealing with this question, we are not compelled to decide upon a very nice construction of words, nor is it necessary to strain the words of the Act. With respect to the Act of Victoria, it does not profess to make provisions applicable to the construction of all Railways in every respect, and upon every occasion. That would have been impossible, because Railways, not belonging to a class of immutable things, but each having its own local peculiarities, must require their own individual legislative privileges; and there must necessarily be provisions arising out of their local circumstances, which could not by possibility be made the subject of general provision. But still there are many matters relating to Railways which are common to almost all; and, with respect to such matters, the Act would seem to be a

salutary one in two respects: it shortens the length of the special Acts for particular Railways, in furnishing, by way of reference, well understood provisions, applicable to such cases; it lessens the trouble and expense of preparing these Acts; and, by conferring, as far as it is applied, uniformity, it makes the decisions that have taken place with respect to one Railway applicable to another, which is a great advantage, as it makes the law clear and intelligible. Otherwise, if special provisions were to be carried into effect by special words in each Act, distinctions would be taken, and questions would arise upon each Act, whether the words were absolutely equivalent, not being quite the same in this Act and in others. Questions of that kind are very unsatisfactory and injurious to the administration of justice, and are prevented by the scope and policy of this Act. Its effect is, to leave things fit for local provision subject to local provision. Now, with respect to tunnels and engineering works generally, it is quite evident that they are fit for such provisions, and any variation or alteration of them that may be required from what is proposed and shewn to the public, is a matter almost altogether impossible to be determined by general regulation, and is eminently fit to be the subject of local provision in the special Act; accordingly, the general principles laid down, if one chooses to adopt them, are very plain and simple. It is said, in section 13, that where a tunnel is shewn upon the plans, it must be made accordingly; and it seems to me plain enough, that where on a line of Railway a tunnel is laid down, you must make the tunnel there. The 15th section throws a light on that. It is remarkable how section 14 should have escaped notice. That section says, that no engineering work shall be altered or deviated from, except under certain circumstances, which are mentioned, and are of frequent occurrence, and which do not comprehend the case in question. The words have been tried by torture, and I do not

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think with any degree of success; they have come out of the rack with their natural dimensions and force, and they express what they did express before the attempt at twisting them was made. The 14th section enacts, that, where there is an engineering work, such as a tunnel, there shall be no alterations made as to its position, unless the parties choose to provide for it in the special Act of Parliament. If they do, they shall provide for something which is applicable in that particular place to that particular tunnel, which they well know; but which it would be impossible, without provisions of enormous length and detail, to provide for by the general Act. Giving that meaning to the words, it is clear, that if such power of deviating applies to the line, as is mentioned in the 15th section, it would be entirely contradictory to the 13th and 14th with respect to engineering works, unless we understand that it does not comprehend engineering works. If that be so, as there is no express provision in the local Act, the parties must be taken—the Company on the one hand and the public on the other—to be satisfied, with respect to the tunnels and engineering works, that the Company should be bound to make them as they had laid them down in the original line. Then, the question is, supposing, without power to deviate, they do deviate (as they have done here), though the legislature has not enabled them to do so, whether they have cast upon them the duty of making a tunnel. Now, they have not the power, and therefore they cannot have the duty. They may have done something which is wrong to the plaintiff in making the deviation at all. That is the ground of complaint. He says, that the ground of complaint is the not making the tunnel on the deviated line,—that, not having made the tunnel where they have laid it down, they have done something of which the plaintiff has a right to complain; but that does not impose the liability upon them, of itself, without evidence of contract. The liability to make the tunnel on

the deviated line would be a natural subject of agreement. It seems clear, that, under the Act, according to its words and according to its spirit, and the occasion and purpose for which it passed, the Company had no power to deviate from the line so as to make it not pass through the tunnel which they laid down, and which they were bound to make. That being so, the wrong they have been guilty of in deviating where they ought not, does not impose upon them the duty of making the tunnel. They are in the situation of wrong-doers, subject to such remedies as the law might afford to those who are suffering from that wrong. I therefore think, that judgment must be for the defendants.

WILLIAMS, J., and TALFOURD, J., concurred.

Rule absolute.

Hilary Term, 1852.

SMITH and Others v. THE HULL GLASS COMPANY.

Jan. 22nd.

DEBT for goods sold and delivered.

Plea, never indebted.

At the Michaelmas Sittings, 1851, before *Cresswell, J.*,

A Joint-stock Company, completely registered, carried on business under a deed of set-

tlement, which empowered the board of directors to appoint a manager of the works to superintend the manufacturing business. The board were entitled to delegate such of their powers to the manager as would enable him to carry on the works. They had power to do all other acts necessary for the objects of the Company. The entire management of the affairs of the Company was given to the board of directors, who were empowered to delegate their power to any one or more of their body.

Orders for goods were given, severally, by the chairman, deputy chairman, manager, and secretary; and the goods were delivered on the premises of the Company, and used in their business, with the knowledge of the directors:—*Held*, first, that it was consistent with the Joint-stock Companies Act and the deed of settlement, that the manager had a delegated authority to order such goods; and, secondly, that, though the chairman and secretary might have no such power, and though their orders were never duly adopted, yet, as the goods were had with the knowledge of the directors, the Company were liable.

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this cause was tried a second time (a). A special verdict was found, which was afterwards turned into a special case.

The defendants were a Joint-stock Company, completely registered under the 7 & 8 Vict. c. 110, carrying on business under a deed of settlement, the material provisions of which were as follows:—

By clause 7, a manager of the works, factories, and business of the Company, was to be appointed from time to time, who was to reside on or near the works of the Company. By clause 53, a board of directors was to meet once a week; and by clauses 55, 57, and 59, not less than three directors could act. By clause 62, the minutes of the proceedings at such board were to be signed by the chairman and any two directors present; or, if the seal of the Company were attached, to be signed by the chairman only. Clause 63 gave the board power to regulate their proceedings as they might think fit. Clause 69 empowered the board to appoint one or more manager or managers of the works to superintend and transact the manufacturing business of the Company under the control of the board; and clause 70 gave them power to appoint a solicitor, secretary, and other officers, &c. By clause 74, the board was entitled to delegate such of their powers to the manager as would enable him to carry on the works in an efficient manner. By clause 78, the board had full power to do all other acts necessary for the objects of the Company. By clause 79, all purchases to be made by or on behalf of the Company, were directed to be paid for when due by cash or bills. By clause 81, in order to limit the liability of individual shareholders, the board was directed to cause all contracts on behalf of the Company to be made with an express stipulation that each shareholder should be

(a) See the report on the first trial, and a full statement of the facts of the case, 8 C. B. 668.

liable in respect of such contracts to the extent of his share only. By clause 84, all payments were to be made by order or under the direction of the board, and no payment was to be valid without such order or direction. By clause 116, the entire management of the affairs of the Company was given to the board of directors, in conformity with the regulations established by general meetings. By clause 117, the managers and secretary were to attend the board and the general meetings, and give an account of all transactions relating to the business of the Company, and were to keep books and accounts, and to obey all the orders of the board. By clause 120, the directors were empowered to delegate their powers to any one or more of their body. And by clause 142, the shareholders were prevented from contracting without an order of the directors.

The several orders for the goods for which the action was brought were given, on account of the Company, by the chairman or deputy chairman of the directors, or by the manager or secretary. It had been the invariable practice for such orders to be given by those persons, and the goods were delivered on the premises of the Company and accepted there by persons in their employ, and were used in their business with the knowledge of the directors. W. Farthing, Son, & Co., general agents in Hull, were employed by the Company as general agents, and the goods were in their possession as agents of the plaintiffs, to be sold and disposed of for them. The goods were all delivered with invoices made out to the Company in the name of W. Farthing, Son, & Co., without disclosing the plaintiffs their principals. The first parcel of goods was ordered by W. Farthing, the elder, who was then chairman of the directors of the Company; the second by the deputy chairman; the third by the manager of the works and factories; and the fourth by the secretary. Each of the parcels was of less value than 50*l*. There was no general bye-law made by

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the Company nor by the directors, nor was there any minute or resolution of any board of directors authorising any of the said orders or purchases, or delegating to the manager any of the powers given them by the deed, except certain resolutions granting to the general manager a salary for his services.

Bovill (with whom was *Butt*) for the plaintiffs (a).—Independently of the Joint-stock Companies Act, the defendants would be liable: *Beverley v. The Lincoln Gas-light and Coke Company* (b), *Church v. The Imperial Gas-light and Coke Company* (c). Then, is there anything in the statute 7 & 8 Vict. c. 110, or the deed, that prevents that liability from attaching. The 44th section (d) is material; the for-

(a) Before *Jervis*, C. J., *Maule*, J., *Cresswell*, J., and *Williams*, J.

(b) 6 A. & E. 829.

(c) *Id.* 846.

(d) That section provides:—
 “And for the purpose of regulating contracts entered into on behalf of any Joint-stock Company completely registered under this Act (except contracts for the purchase of any article the payment or consideration for which doth not exceed the sum of fifty pounds, or for any service the period of which doth not exceed six months, and the consideration for which doth not exceed fifty pounds, and except bills of exchange and promissory notes), be it enacted, That every such contract *shall* be in writing, and signed by two at least of the directors of the Company on whose behalf the same shall be entered into, and shall be sealed with the common seal thereof, or signed by some

officer of the Company on its behalf to be thereunto expressly authorised by some minute or resolution of the board of directors applying to the particular case; and that, in the absence of such requisites or of any of them, any such contract shall be void and ineffectual (except as against the Company on whose behalf the same shall have been made); and that every such contract for the purchase of any article the consideration of which doth not exceed the sum of fifty pounds, or for any services the period of which doth not exceed six months and the consideration for which doth not exceed fifty pounds, entered into on behalf of any Joint-stock Company completely registered under this Act, *may* be entered into by any officer authorised by a general bye-law in that behalf.”

malities required by that section as to contracts above the value of 50*l.*, are imperative, and as to contracts under that sum are permissive. This case falls within the latter class. There is nothing in the deed of settlement that affects their liability. But here the contract is executed, and the Company have had the benefit of it; on that ground, therefore, they are clearly liable. The cases of *Hall v. The Mayor of Swansea* (a) and *Ridley v. The Plymouth Grinding and Baking Company* (b) are not applicable. In the former case, the contract was foreign to the business of the Company; and in the latter, the contract was not in the usual course of trade, and it was executory.

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Hugh Hill contra.—The defendants are not liable, the parties entering into the contract having no power to do so. This any one might have learned by inspecting the deed of settlement, which the plaintiffs might have done (c). The 55th, 57th, and 58th clauses prevent the directors from entering into any contract except at a board at which three are present, so that the orders by the chairman are not binding, nor are those by the secretary. The 117th gives no such authority, and there was no delegation of authority shewn within clause 120; and no order can be binding unless made by the directors or some one properly delegated by them. If so, the fact of the contract being executed does not render the Company liable, unless adopted by those authorised to enter into the contract: *Ridley v. The Plymouth Grinding and Baking Company* (b), *Homersham v. The Wolverhampton Waterworks Company* (d).

Bovill in reply.

JERVIS, C. J.—I am of opinion that the plaintiffs are

(a) 5 Q. B. 526.

(b) 2 Exch. 711.

(c) 7 & 8 Vict. c. 110, s. 18.

(d) Ante, Vol. 6, p. 790; 6 Exch. 137.

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entitled to our judgment. There were four different classes of orders given for the goods. The first class consisted of goods ordered by the manager; and if we adopt the rules supposed to govern Joint-stock Companies, it must be taken that the authority to give the order was delegated to him. The 69th clause of the deed empowers the directors to appoint a manager, who is to superintend and transact the business of the manufactory; and it must be taken that he had authority to purchase materials for the purposes of the manufacture, unless precluded by the Act or the deed of settlement. It is quite consistent with all the provisions of the statute and of the deed, that the manager had a delegated authority; and he might have had a general authority. As to the other three classes of orders which were given by the chairman, the deputy chairman, and the secretary, respectively, they stand upon a different ground. It is said, that the Company must have been known to be acting under the deed of settlement, and that the public have no reason to complain if they have dealt with unauthorised persons, because they might have seen the deed which was registered. That may be so, but on this point I pronounce no opinion. In this case, even if the chairman, the deputy-chairman, and the secretary had no authority, and even if their orders were never duly adopted and recognised, yet it must be taken that the goods were used with the knowledge of the directors, and, therefore, that they were ordered by the directors, an order by the board not being, in my opinion, necessary.

MAULE, J.—I am also of opinion that the plaintiffs are entitled to our judgment. The defendants are a Joint-stock Company, and the action is brought under the provisions of the Joint-stock Companies Registration Act and the registered deed. The statute and the deed together enable the defendants to carry on business by means of directors. They speak of directors generally. Where notice is

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course of business at a shop or counting-house. In such a case, a customer is not obliged to prove the authority of the shopman or clerk with whom he deals; if the persons employed are acting contrary to the authority of their employers, that is the fault of the latter. It seems to me, therefore, that the Company is bound by the acts of persons taking upon themselves, with their authority, to act in their name, and receiving goods at their place of business. The case differs from one in which the contracting party must be taken to know that the persons with whom he deals are incompetent to enter into the contract. Here, every presumption is to be made in favour of the plaintiffs and against the defendants, that the goods were ordered and enjoyed by the Company; and the only objection is, that the persons acting for the Company were not duly authorised, a circumstance within the knowledge of the Company, but not within that of any one else.

CRESSWELL, J.—I am also of the same opinion. As to the goods which were ordered by the manager, and delivered on the premises and used there, it must be taken that the manager was properly appointed; and by the 69th section of the deed of settlement, the manager is empowered to transact the manufacturing business of the Company, and must have had power to order goods. As to the other parcels of goods, they were ordered by the secretary or by one of the directors. I do not mean to say that any one of those persons was entitled to give the orders. But the goods were delivered with invoices to the Company, shewing that they were sold to the Company, and they were accepted by persons who had power to take the goods of the Company into their possession. We must assume that the directors knew of the invoices, and that, knowing the goods had come, they allowed them to be used. The directors, therefore, adopted the orders, and recognised the statement in the invoices.

WILLIAMS, J.—I am of the same opinion. The goods were received on the premises and used for the purposes of the Company. That statement, with the other facts, puts the case on the same footing as if the goods were ordered by all the directors, though not sitting as a board. If that had been proved, the Company would have been liable.

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Judgment for the plaintiffs.

Easter Term, 1852.

RICKETTS v. THE EAST AND WEST INDIA DOCKS AND BIRMINGHAM JUNCTION RAILWAY COMPANY.

April 28th.

CASE.—The first count stated, that, after the passing of the Railways Clauses Consolidation Act, 1845, and “The East and West India Docks and Birmingham Junction Railway Act, 1846,” the defendants were owners of a certain Railway, which ran upon and over certain land taken for the use of the same under the provisions of the statute in such case made, and which was used for the propulsion of carriages by locomotive steam-engines; that the plaintiff was possessed of fifty sheep, which were depasturing and lawfully being in and upon certain land adjoining to and abutting upon the said Railway of the defendants, and to and upon the said lands so taken for the use thereof; that it was the duty of the defendants to make and erect a sufficient fence in and upon the said land of the said defendants, adjoining to the same Railway, for protecting and preventing cattle being on the said lands from straying out of the said adjoining lands to or upon the said Railway; yet the defendants did

The plaintiff was the owner of a close adjoining a close which was the property of the Great Northern Railway Company, and by a defect in his fences his sheep strayed on their close, and by a defect in the defendants’ fences, they got on the defendants’ Railway, and were there killed:—*Held*, that, although the Great Northern Railway Company would be entitled, in such a case, to maintain an action for an injury done to their cattle straying from their

close, yet, that the plaintiff was not so entitled, either at common law or under 8 Vict. c. 20, s. 68.

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not make in or upon the said land so taken for the use of the said Railway, or adjoining to the same, a sufficient fence for protecting or preventing the sheep of the plaintiff so depasturing and being, from straying or escaping from the said adjoining lands; by means whereof and for want of such fence the said sheep of the plaintiff strayed into and upon the said Railway of the defendants, and a certain train struck the said sheep, whereby twelve of them were killed. The second count was similar to the first, but upon this no question turned.

Fourth plea.—To the first count, that it was not the duty of the defendants to make or erect a sufficient fence upon the said land for protecting or preventing cattle or sheep from straying, modo et formâ. Seventh, that the Great Northern Railway Company &c., were possessed of the said lands adjoining to and abutting on the said Railway of the defendants, from and out of which the said sheep of the plaintiff strayed into and upon the said Railway; and that the said sheep of the plaintiff were wrongfully and unlawfully in and upon the said lands of the said Great Northern Railway Company, trespassing and doing damage there, without the leave or license of the said last-mentioned Company; and that the plaintiff was not the owner or occupier of the lands from and out of which the said sheep so escaped and strayed &c.—Verification.

Demurrer and joinder.

Thompson Chitty, in support of the demurrer (a).—The duty arises under the 68th section of the Railways Clauses Consolidation Act (8 Vict. c. 20) (b), and as between the

(a) Before *Jervis*, C. J., *Cresswell*, J., *Williams*, J., and *Talfourd*, J.

(b) Which enacts, that “The Company shall make and at all times thereafter maintain the following works for the accom-

modation of the owners and occupiers of lands adjoining the Railway; (that is to say,)—

“Also sufficient posts, rails, hedges, ditches, mounds, or other fences for separating the land taken for the use of the Railway

plaintiff and defendant, the plaintiff may, in principle, be taken as the occupier of the close, from which his sheep strayed on the defendants' Railway; and that view is confirmed by *Fawcett v. The York and North Midland Railway Company* (a). There is no doubt that a trespasser may sue for an injury done whilst trespassing: *Barnes v. Ward* (b), *Davies v. Mann* (c).

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J. Brown contra.—The duty to fence, at common-law, exists as against the owner of the adjoining land, and not as against the whole world: *Lil. Ent.* 70; *Hearne's Pleader*, 61; *Fitz. N. B.* 128; *Rooth v. Wilson* (d), *Powell v. Salisbury* (e). And although the Great Northern Railway Company might in this case, if they were the owners, maintain an action against the defendants, the owner of trespassing cattle cannot: *Dovaston v. Payne* (f), *Sir Francis Leke's case* (g).

Thompson Chitty in reply.

JERVIS, C. J.—I am of opinion that the defendants are entitled to our judgment. This case is one of considerable importance, and it has been very properly agreed that it should be disencumbered of technicalities, in order that the decision on it may be a guide for the future. The admitted facts are as follows: the plaintiff was owner of a close adjoining a close which was the property of the

from the adjoining lands not taken, and protecting such lands from trespass, or the cattle of the owners or occupiers thereof from straying thereout by reason of the Railway, together with all necessary gates, made to open towards such adjoining lands and not towards the Railway, and all necessary stiles; and such posts, rails, and other fences shall be made forthwith after the tak-

ing of any such lands, if the owners thereof shall so require, and the said other works as soon as conveniently may be."

(a) 20 L. J., Q. B., 222.

(b) 19 L. J., C. P., 195.

(c) 10 M. & W. 546.

(d) 1 B. & Ald. 59.

(e) 2 Y. & J. 391.

(f) 2 H. Bl. 527.

(g) 3 Dyer, 365.

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Great Northern Railway Company; by a defect in his fences the sheep strayed into that close, and by a defect in the defendants' fences they strayed on the defendants' Railway, and were there killed. It is not suggested that the sheep were killed wilfully, or by the negligent driving of the defendants' servants. Under these circumstances, although the owners of the close adjoining the Railway would be entitled to maintain an action for an injury done to their cattle straying from their close, the plaintiff would not be so entitled. The law on this subject is laid down in *Pomfret v. Ricraft*, 1 Wms. Saund. 322, where it is said, "this kind of action will only lie against a person who can be shewn to be bound by prescription or special obligation to repair the fence in question for the benefit of the owner or occupier of the adjoining land; and no man can be bound to repair for the benefit of those who have no right. Therefore, the plaintiff cannot recover for the damage occasioned to his cattle by their escape from the adjoining close through the defect of the defendants' fences, unless the plaintiff had an interest in that close." Now, applying that rule to this case, had the plaintiff any right to have his sheep on the close adjoining the defendants' Railway? It is admitted, that they were there not by any license or right, but by trespass. Then, applying the rule of law and the cases decided upon it, it is clear that the defendants would be liable for the non-repair of the fences only as against the proprietors of the adjoining close, and the plaintiff would not be entitled to maintain this action.

The next question is, has the Act of Parliament varied the ordinary common-law liability. It seems to me, that, so far from varying it, the statute has taken the common law as the measure of the liability to be incurred by Railway Companies with regard to fences; and that the 68th section has cast upon them the liability to make and maintain fences as against the owners or occupiers of

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not an owner or occupier of the adjoining land; he is, therefore a mere stranger, and cannot maintain this action.

TALFOURD, J., concurred.

Judgment for the defendant.

Easter Term, 1852.

May 1st &
3rd.

AUSTIN and Another v. THE MANCHESTER, SHEFFIELD, AND
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The defendants, the proprietors of a Railway, contracted to convey the plaintiffs' horses thereon, subject to certain terms contained on a ticket, whereby it was stipulated that the ticket was issued subject to the plaintiffs' undertaking to bear all the risks of injury by conveyance and other contingencies; and that the plaintiffs were required to see to the efficiency of the carriages before they allowed their horses or live stock to be placed therein; and that, the charge being

for the use of the railway carriages and locomotive power only, the defendants would not be responsible for any alleged defects in their carriages or trucks, unless complaint was made at the time of booking, or before the same left the station, nor for any damage, however caused, to horse, cattle, or live stock of any description travelling upon the said Railway, or in the defendants' vehicles:—*Held*, that this exemption applied to all risks of whatever kind, and however arising, to be encountered in the course of the journey, including the risk of a wheel taking fire owing to neglect to grease it, whether from "negligence," "gross negligence," or "culpable negligence."

CASE.—The declaration stated, that the defendants were the owners and proprietors of the Manchester, Sheffield, and Lincolnshire Railway, and were possessed of certain carriages and trucks, used by them for the carriage and conveyance of passengers and horses in and upon and along the said line for hire and reward, and did exercise and carry on the business of common carriers for hire along the said Railway. And, according to the usual known course of business by the defendants and persons employing them to carry passengers and horses by the said Railway, it was incumbent upon and the duty of the said defendants to cause due and proper care to be taken, and proper and reasonable and sufficient provision to be made from time to time during any such journey on which any passengers and horses were being conveyed by the defendants, in order to guard and provide against the friction of and arising during the said journey from the wheels and axles of the said trucks and carriages wherein such pas-

sengers and horses were being conveyed, and the parts of the said trucks and carriages near to and in contact and connected with the said wheels and axles, and in order to guard and provide against fire being produced by such friction, and to preserve such carriages and the wheels and axles from being broken and injured by such friction and fire as aforesaid; and, according to the said course of business then practised and observed by the defendants and persons so employing them, the persons so employing them had no power or control over the management of any of the said trucks or carriages during any such journey, nor were they permitted or allowed to do any such things as were proper or necessary to guard against such friction and fire, or to preserve the said carriages, trucks, wheels, axles, or other parts aforesaid, from being broken and injured; and, without certain reasonable and proper provision being made against such friction and fire as aforesaid during such journeys as aforesaid, passengers and horses cannot and could not be safely carried or conveyed in such trucks and carriages by or along the said Railways. And the plaintiffs, on the 23rd day of February, A. D. 1849, delivered to the defendants, at New Holland, at the Railway station, divers horses of the plaintiffs, to be conveyed by the defendants for the plaintiffs in and upon three of the said trucks on the said Railway for hire from New Holland to the Shoreditch station, according to the usual and known course of business, except so far as the same was altered or qualified by certain terms, expressed as hereinafter mentioned in a certain ticket by the defendants prepared and produced to the plaintiffs. That it was, in and by the said ticket expressed, that the sum charged to the plaintiffs in respect of the premises was 22*l.* 10*s.*, being 7*l.* 10*s.* for each of the said three trucks; and that the said ticket was issued subject to the plaintiffs' undertaking to bear all the risks of injury by conveyance and other contingencies; and that the plaintiffs were required to see

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to the efficiency of the carriages before they allowed their horses or live stock to be placed therein; and that, the charge being for the use of the Railway carriages and locomotive power only, the defendants would not be responsible for any alleged defects in their carriages or trucks, unless complaint was made at the time of booking or before the same left the station, nor for any damages, however caused, to horses, cattle, or live stock of any description, travelling upon the said Railways or in the defendants' vehicles. And the defendants then accepted and received from the plaintiffs the said horses, to be conveyed as aforesaid, according to the usual known course of business, except so far as the same was varied or qualified by such terms as aforesaid. That, although the defendants did accept from the plaintiffs the said horses for the purpose aforesaid, and did place them in three of the said trucks for the purpose of being conveyed as aforesaid, the efficiency of which said trucks the plaintiffs then saw and were satisfied with before the said horses were placed therein; and the said horses were booked, and the said trucks with the said horses therein then left the station upon such journey; yet the defendants did not, during the said journey, cause due and proper care, or cause proper or reasonably sufficient provision, to be taken or made in order to provide against the friction arising during the said journey of and from the wheels and axles of the said trucks and carriages wherein the said horses were being carried, and from the said parts of the said trucks near to and in contact and connected with the said wheels and axles, or in order to guard and provide against fire being produced by such friction, or to preserve the said trucks, wheels, axles, and other such parts from being injured and broken by such fire and friction, but altogether grossly and culpably neglected and omitted so to do; by reason whereof, and of the gross and culpable negligence of the defendants in that behalf, and after the trucks with the said

horses therein had left the station, and whilst the same were under the direction and control of the defendants, one of the axles of one of the said trucks, wherein seven of the said horses were being carried, and the wheels connected with the said axle, became heated by such friction, and fire was thereby produced; and the said parts of the said truck near the said truck thereby became dangerous and unfit for the future carriage and conveyance of the said horses; of all which the defendants then had notice, and were then requested by the plaintiffs either to cause to be made proper and reasonably sufficient provisions against the said friction and the fire occasioned thereby, or else to carry the said horses for the remainder of the said journey in some other carriage fit and proper, which they neglected and refused to do. That, after such fire had been produced by such friction, and after the said truck had become dangerous and unfit for the further conveyance of the said horses, and after the defendants had notice thereof, and after the defendants had been so requested, although the defendants then could have caused to be made proper and reasonably sufficient provisions against such friction as aforesaid and the fire occasioned thereby, or else have carried the said horses for the remainder of the said journey in some other carriage fit and proper in that behalf, and although a suitable and convenient opportunity for removing the said horses into a safe, fit, and proper truck, and before the said axle so broke as hereinafter mentioned, occurred and offered itself, as they the defendants then well knew, nevertheless, they the defendants, disregarding their duty to the plaintiffs, and the said request of the plaintiffs in that behalf, then recklessly, culpably, and with gross negligence and total disregard to the safe and proper conveyance of the said horses, and against the will of the plaintiffs, and well knowing the said truck and carriage to be so dangerous and unfit as aforesaid, continued to carry and caused to be carried the

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said horses on the said journey along the said Railway, in the said truck and carriage, so having become during the said journey, and then being, so dangerous and unfit as aforesaid, without making proper or reasonably sufficient provisions against friction as aforesaid, or the fire occasioned thereby, until the said axle became further heated by such friction as aforesaid, and until further fire was then produced upon and about the said wheel and axle and the parts of the said truck and carriage near to and in connexion and contact therewith, and until the said axle, by reason of such friction and the heat and fire, and through the gross and culpable negligence and grossly improper conduct of the defendants, then became and was so weakened, that the same broke, and thereby the said truck, wherein the last-mentioned horses were so being carried as aforesaid, was then violently thrown out of its proper position on the rails of the Railway, along which the same was then passing; and the said horses, then being therein, were then thrown violently down and greatly lamed and otherwise injured, insomuch that one of the said mares of the plaintiffs died, and the remainder of the horses, in consequence of such injuries, became deteriorated. That the said damages and injury to the said horses were entirely occasioned by the gross negligence and the gross misconduct of the defendants in manner aforesaid, and were not caused by any insufficiency or defects existing in the said truck or carriage before or at the time the said horses were placed therein, at the time of such booking as aforesaid, on or before or when the same left the station as aforesaid, nor by any injury or risk of injury by conveyance or other contingency.

Second count in trover.

Pleas—first, not guilty; secondly, to the first count—That the alleged injury was occasioned by conveyance and other contingencies, within the true intent, meaning, and effect of the said ticket in that count mentioned, and not

by the negligence or misconduct of the plaintiffs in that behalf. Thirdly, to the first count, that the damage and injury to the said horses were occasioned by the insufficiency of and defects existing in the said truck at the time when the said horses were placed therein.

The cause was tried before *Jervis*, C. J., at the Sittings after Hilary Term, 1852, when the facts alleged in the first count were proved. His Lordship left it to the jury to say, whether due care had been exercised by the defendants. The jury found that it had not, and the plaintiffs had a verdict, damages 60*l*.

A rule nisi having been obtained by *Watson* for a new trial, or for arresting the judgment,

Macaulay, *Rew*, and *West*, now shewed cause (a).—The declaration charges a direct misfeasance, and the terms of the ticket do not exempt them from the consequences of such conduct. The exemption provided by the ticket must be taken with the qualification that the Company will do its duty, and it does not exempt them from gross negligence: *Garnett v. Willan* (b), *Beck v. Evans* (c), *Lyon v. Mells* (d). In the case of *Shaw v. The York and North Midland Railway Company* (e), the action would have been maintainable were it not for the pleadings. It would be against reason to suppose that the exemption in the ticket applied to wilful misfeasance, and the authorities shew that it does not: *Wyld v. Pickford* (f), *Story on Bailments*, s. 554. An agreement that the defendants would not use any care would be repugnant and void: *Furnival v. Coombes* (g). The cases of *Owen v. Burnett* (h),

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(b) 5 B. & Ald. 53.

(c) 16 East, 244.

(d) 5 East, 428.

(e) Ante, Vol. 6, p. 87; 13 Q. B. 347.

(f) 8 M. & W. 443.

(g) 5 M. & Gr. 736.

(h) 2 Cr. & M. 353

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and *Chippendale v. The Lancashire and Yorkshire Railway Company* (a) do not apply.

Watson and Hawkins contra.—The question turns on the meaning of an express contract. What then is the meaning of that contract? It must be, that the defendants will not be liable for any damage however occasioned. [*Jervis, C. J.*—Do not the words “other contingencies” in the ticket mean other contingencies by conveyance; the contingencies here were not by conveyance.] Other contingencies mean those happening on the journey; and even for gross negligence they would not be liable: *Hinton v. Dibbin* (b). [*Jervis, C. J.*—It seems rather an alarming proposition, that the Company can exempt themselves from all responsibility; if they can as to goods, why may they not as to passengers?] The express contract speaks for itself, and exempts the Company from all liability. The defendants find trucks and locomotive power, and the plaintiffs undertake the risks of the journey.—They cited *Johnson v. The Midland Railway Company* (c), and *Owen v. Barnett* (d).

May 8th.

CRESSWELL, J., delivered the judgment of the Court. After stating the pleadings and facts, he proceeded:—We have taken some days to consider the various authorities referred to, and are now of opinion that the rule for arresting the judgment must be made absolute. The declaration appears to have been drawn with care, in order to avoid the objection upon which the demurrer in *Shaw v. The York and North Midland Railway Company* proceeded, and to lead to the supposition that there was some duty cast upon the defendants beyond that which arose out of the special contract made between them and the plaintiffs; but, after all the allegations as to the usual and known course of business practised and observed by the defend-

(a) 21 L. J., Q. B., 22.

(b) 2 Q. B. 646.

(c) Ante, Vol. 6, p. 87; 4 Exch. 367.

(d) 2 C. & M. 353.

ants, the plaintiffs found themselves obliged to aver, that their horses were delivered to the defendants to be carried "according to the usual and known course of business so practised and observed, except so far as the same was altered or qualified by certain terms expressed in a certain note or ticket then by the defendants prepared and produced to the plaintiffs." [The learned Judge read the ticket.] Notices of various kinds have from time to time been published by common carriers, with a view to limit the responsibility cast upon them by the common law. At one period there was a disposition in our Courts to hold that common carriers could not by their notices shake off that responsibility; but Mr. Story, in his work on Bailments, s. 549, observes: "The right of making such qualified acceptances by common carriers seems to have been asserted in early times. Lord Coke declared it in a note to *Southcote's case* (a), and it was admitted in *Morse v. Slue* (b). It is now fully recognised and settled beyond any reasonable doubt in England." For this assertion he cites a number of authorities, and we think that he has drawn a correct conclusion from them. The question to be considered then is, what was the true nature of the contract entered into between the parties in this case? The ticket, which contains the terms of the contract, was issued, subject to the owner's undertaking to bear all the risk of injury by conveyance or other contingencies. If this had been the only passage applicable to the risks to be borne by the owners, it might have been contended on their behalf, that it did not extend beyond injuries sustained by reason of a journey by railway simply, or by means of some accident; and that it would not protect the carriers from the consequences of negligence on the part of themselves or their servants. But the ticket further states, that the Company will not be responsible "for any damage, however caused, to horses,

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(a) 4 Rep. 84.

(b) 1 Vent. 238.

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cattle, or live stock of any description, upon their Railway or in their vehicles." The framer of the declaration appears to have felt that this latter part of the ticket or contract (for such it was) protected the Company from liability, if injury was sustained by the want of what is usually called due care; and therefore, after alleging that the defendants did not take due and proper care to provide against friction of the wheels and axles, he charges them with grossly and culpably neglecting to do so; by reason whereof, and of the gross and culpable negligence of the defendants, the wheels of the carriage in which the horses were took fire, and the injury complained of was sustained. And if the terms of the contract are not sufficient to exonerate the Company from responsibility for damage resulting from such negligence as is imputed, the judgment cannot be arrested. The term "gross negligence" is found in many of the cases reported on this subject, and it is manifest that no uniform meaning has been ascribed to those words, which are more correctly used in describing the sort of negligence for which a gratuitous bailee is held responsible, and have been somewhat loosely used with reference to carriers for hire. And in *Hinton v. Dibben*(a), a case depending on the Carriers' Act, (11 Geo. 4 & 1 Will. 4, c. 68), Lord *Denman*, in giving judgment, observed, with much truth: "It may well be doubted, whether, between gross negligence and negligence merely, any intelligible distinction exists." In *Owen v. Burnett*(b), Baron *Bayley* said: "As for the cases of what is called gross negligence, which throws upon the carrier the responsibility from which, but for that, he would have been exempt, I believe that in the greater number of them it will be found that the carrier was guilty of misfeasance." Such, certainly were the cases of delivery to a wrong person, sending by a wrong coach, or carrying beyond the place to which the goods

(a) 2 Q. B. 646.

(b) 2 C. & M. 353.

were consigned. But this observation will not explain all the decisions on the subject. There are others in which the carrier has been held liable for such negligence as warranted the Court in holding that he had put off that character. But there is nothing in this declaration amounting to a charge of misfeasance or renunciation of the character in which the defendants received the goods. The charge is, that they ought to have taken precautions to guard against the consequences of friction of wheels and axles, and that they did not do so, and were guilty of gross negligence in not doing so. The terms "gross negligence" and "culpable negligence" cannot alter the nature of the thing omitted, nor can they exaggerate such omission into an act of misfeasance or renunciation of the character in which they received the horses to be carried. The question, therefore, still turns upon the contract, which, in express terms, exempts the Company from responsibility for damages, however caused, to horses, &c. In the largest sense, those words might exonerate the Company from responsibility, even for damage done wilfully,—a sense in which it was not contended that they were used in this contract; but, giving them the most limited meaning, they must apply to all risks of whatever kind, and however arising, to be encountered in the course of the journey, one of which is undoubtedly the risk of a wheel taking fire, owing to neglect to grease it. Whether that is called "negligence" merely, or "gross negligence," or "culpable negligence," or whatever other epithet may be applied to it, we think it is within the exemption from responsibility provided by the contract; and that, such exemption appearing on the face of the declaration, no cause of action is disclosed, and that judgment must be arrested.

Rule absolute accordingly.

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COURT OF EXCHEQUER.

*Trinity Vacation, 1852.**Feb. 21st,
June 19th.*THE GREAT NORTHERN RAILWAY COMPANY, Appellants, *v.*
SHEPHERD, Respondent.

A carrier of passengers, unless there be a special contract, is only bound to carry the personal luggage of a passenger; and if he have with him merchandise, the carrier is not liable for its safety, unless the carrier knows that it is merchandise and does not object.

A man and his wife traveling by a third-class train are entitled, under 7 & 8 Vict. c. 85, s. 6, to take a hundred weight of luggage between them.

THIS was a case stated for the opinion of the Court by the judge of the County Court of Yorkshire:—

The action was brought to recover 40*l.* 3*s.* 2*d.*, the value of the following items:—

	£	s.	d.
124 dozen of ivory handles, cost price	33	19	8
Carpet bag	0	7	0
Books	0	15	0
Two handkerchiefs	0	1	6
Loss of sale of ivory handles and expenses	5	0	0
	£40	3	2

The cause was tried on the 5th of November, 1851, when it was proved or admitted, that, on the 2nd of August, 1851, the plaintiff, who is a cutler at Sheffield, took a third class ticket of the defendants at the Great Northern Railway station at Sheffield, to go (by one of their excursion trains) to London and back, for which he paid 5*s.* During the plaintiff's stay in London he purchased a quantity of ivory handles for table knives. On the 6th of August the plaintiff left London by the return excursion train of the defendants, accompanied by his wife and two other persons. The luggage of the plaintiff consisted of a carpet bag, a deal box about two feet long, and two brown paper parcels, wrapped in blue checked handkerchiefs. The carpet bag, besides some books and other trifling articles, of the value of 1*l.* 3*s.* 6*d.*, contained ivory handles, as did also the box and parcels, and the total quantity of

ivory handles was 283 dozen. Each packet had upon it the plaintiff's name and address, both at Sheffield and in London. The luggage allowed to a third class passenger by the 7 & 8 Vict. c. 85, s. 6, is 56lbs., and the same weight was also allowed to third class passengers by the defendants' excursion train.

The plaintiff admitted that he took no other luggage with him from Sheffield, and that the ivory handles were articles bought by him to use in his business. The plaintiff and his wife placed the bag and parcels in the carriage in which they rode, under the seat, and the porters of the Company did not interfere in any way; the box was placed in the luggage van by the plaintiff.

The plaintiff, on arrival at Retford, where the line of railway divides and passengers from Sheffield are obliged to change carriages, took the parcels out of the carriage, and placed them with the box on the platform, where they remained for nearly an hour, until the fresh carriage was ready to proceed to Sheffield. He then put the box in the luggage van, and placed the other parcels in the carriage where he and his wife took their seats to continue their journey to Sheffield, and did not call the porter to assist him. Subsequently to their departure in the train from Retford, and previously to their arrival at Sheffield, a collision took place. The train was obliged to stop on account of some obstruction. There was no guard in attendance upon it to warn any coming train, and the next train run into the train in which the plaintiff and his wife were. They were both much hurt, and upon being assisted into another train, which was then provided for them to be forwarded to Sheffield, the plaintiff, as he was getting into the train, spoke to one of the railway porters about the luggage, who told him "not to make himself uneasy, it would be all right." A messenger, sent by the plaintiff to the defendants station to inquire for the luggage on the

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would be liable for their loss; but how can they, if they do not know what the parcels contain, and have no opportunity of imposing an extra charge?] It was their duty to have made all necessary inquiries. The Court will assume, from there being no guard, that the Company were guilty of gross negligence.—He cited *Walker v. Jackson* (a).

PARKE, B.—It seems to me, that the provision in the Act is equivalent to notice that the Company will carry with each passenger fifty-six pounds of luggage, not merchandise; and the Company would not be liable for any thing but personal luggage. It is necessary to ascertain whether the Company were, with respect to persons travelling by the excursion train, entirely released from the conditions imposed by the statute upon third class trains. If they were, they might nevertheless contract to carry under the obligations relating to parliamentary trains, in which case the plaintiff could not recover. But, if the matter was left at large, the defendants would be under the ordinary obligations of carriers at common law. As to the second question, the husband and wife together are entitled to carry 112 lbs of luggage between them. Unless the parties compromise, the case must be remitted to the judge of the County Court, to state whether the defendants carried passengers by the excursion train upon the terms contained in the 6th section of the 7 & 8 Vict. c. 85, or whether there was a distinct contract in respect of the excursion train.

The case was remitted to the judge, and amended as follows:—

“The Court of Exchequer having, on the hearing of this

(a) 10 M. & W. 161

appeal, ordered that the special case be referred back to the judge of the County Court, to state the terms upon which the defendants carried passengers by the excursion train in question, and whether they carried them upon the terms contained in the 6th section of the 7 & 8 Vict. c. 85, I have to state that no evidence was given or tendered as to the terms upon which the defendants carried passengers by the excursion train, unless the admitted fact, that the charge for each third class passenger by the said train was much less than one penny for each mile travelled, be of itself, in the opinion of the Court of Appeal, sufficient proof in point of law that they carried them upon the terms contained in the said 6th section; and (subject to such opinion of the said Court) I find that the defendants did not carry passengers by the said excursion train upon the terms contained in the 6th section of the 7 & 8 Vict. c. 85; and that there was no special contract as to the terms between the plaintiff and the defendants, but that they carried him and other passengers and their luggage by the said train upon the same terms as those upon which the defendants and other Railway Companies carry passengers, whether of the first, second, or third class, and their luggage, by their ordinary passenger trains; and which terms (as I conceive) are the same as those on which stage-coach proprietors, and other common carriers of passengers for hire do, by the laws of England, carry passengers and their luggage."

Phipson (with whom was *Wordsworth*) for the appellants, cited *Gibbon v. Paynton* (a).

Field, for the respondent, cited *Batson v. Donovan* (b), *Walker v. Jackson* (c), *Riley v. Horne* (d), *Coggs v. Bernard* (e).

(a) 4 Burr. 2298.

(b) 4 B. & Ald. 21.

(c) 10 M. & W. 161.

(d) 5 Bing. 217.

(e) 2 Ld. Raym. 909.

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PARKE, B.—There being no special contract, the defendants were only bound to carry the plaintiff and his luggage, which term, according to the true modern doctrine on the subject, comprises clothing and such articles as a traveller usually carries with him for his personal convenience; perhaps, even a small present, or a book for the journey, might be included in the term, but certainly not merchandise or materials bought for the purpose of being manufactured and sold at a profit. *Angell on Carriers*, s. 115; *Story on Bailments*, p. 526, 5th ed., s. 499. Now, if the plaintiff had carried these articles exposed, or had packed them in the shape of merchandise, so that the Company might have known what they were, and they had chosen to treat them as personal luggage, and to carry them without demanding any extra remuneration, they would have been responsible for the loss. So also without limit as to weight, if the Company chose to allow the passenger to take it. The judge states, that there was no evidence as to whether the defendants carried passengers by this excursion train upon the terms contained in the 6th section of the 7 & 8 Vict. c. 85, unless the Court shall be of opinion that the fact, that the charge for each passenger was less than a penny a mile, was of itself sufficient proof that they carried upon those terms. That, however, it is not necessary to decide; because, assuming that they did not carry on those terms, the defendants only agreed for the stipulated fare to carry passengers and every thing which constituted personal luggage, and were not bound to carry merchandise, or articles wholly unconnected with luggage. If they had had notice, or might have suspected from the mode in which the parcels were packed, that they did not contain personal luggage, then they ought to have objected to carry them; but the case finds that they had no notice of what the packages contained. Whether this was done for any fraudulent purpose, it is not necessary to inquire; be-

cause, even if there was no fraudulent intent, the plaintiff has so conducted himself that the Company were not aware that he was not carrying luggage; and therefore the loss must be borne by him.

It was contended, that, after the accident happened, a new species of contract was entered into, and that the Company then undertook to take care of the plaintiff's luggage. But that argument fails, as there was then no new contract. If an accident had happened to a stranger, and the Company had agreed without compensation to forward his luggage, they would, according to *Coggs v. Bernard*, be responsible for its loss. But here the intention of the Company was only to carry into effect the original contract; the Company are not, therefore, liable, and the judgment of the Court below must be reversed.

PLATT, B., concurred.

Judgment reversed, without costs, the defendants undertaking to pay 1*l.* 3*s.* 6*d.*, the value of the plaintiff's personal luggage.

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NORTHERN
RAILWAY CO.
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v.
SHEPHERD,
Respondent.

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June 26th.

THE GALVANIZED IRON COMPANY v. WESTOBY.

The defendant applied for and obtained an allotment of shares in a Joint-stock Company, completely registered under the 7 & 8 Vict. c. 110, the capital of which was to consist of 500,000*l.*, in 50,000 shares. He paid the deposit, and his name was inserted in the register of shareholders, but he never executed the deed of settlement, or any deed referring to it. The proposed capital was never subscribed, but the Company commenced business with less; and, not succeeding, an Act of Parliament passed for winding up the concern; which, after

DEBT for a call of 2*l.* per share on 100 shares in "The Galvanized Iron Company," with interest from the 18th August, 1848.

Plea, that the defendant was not, nor is, the holder of the said shares.

The cause was tried at the London Sittings after Michaelmas Term, 1851, before *Pollock*, C. B., when it appeared, that, in the year 1845, a Joint-stock Company was projected, for the purpose of mining for iron and coal, and for manufacturing and galvanizing iron. The capital of the Company was to consist of 500,000*l.* in 50,000 shares of 10*l.* each. In pursuance of the defendant's request, one hundred shares were allotted to him. He paid the deposit, and his name was inserted in the register of shareholders, and was also mentioned in the schedule to the deed of settlement, as the holder of such shares; he never signed the deed of settlement or any deed referring to it. In August, 1846, the Company was completely registered under the 7 & 8 Vict. c. 110. Several calls were made, and notices of them were sent to the defendant; but he never paid any of them, nor did he do any act with reference to the Company, except as before stated. The whole amount of capital was never subscribed for, and 25,000 shares only were paid up.

reciting the deed of settlement, that the proposed capital had not been subscribed, and that all the subscribed capital had not been paid up, empowered the directors to sue for calls, enacted, that, in such actions, the register should be *prima facie* evidence of the defendant being a shareholder, and of the number of his shares, provided that such calls should be made according to the provisions of the deed of settlement, and, as regarded the liability of shareholders, should be deemed to have been made under such provisions; and that nothing in that Act contained, except as therein expressly enacted, should render liable to calls any shareholder or other person who would not have been liable thereto if that Act had not passed. The defendant having been sued for calls:—*Held*, first, that though there was a *prima facie* case against the defendant of his being a shareholder, his name being on the register, yet that the *prima facie* case was rebutted, the private Act applying to *shareholders* only, and the defendant not being a shareholder within 7 & 8 Vict. c. 110, s. 30, as he had never executed the deed of settlement; Secondly, (*Martin*, B., dubitante), that, even if the private Act extended to *subscribers*, the defendant was not liable, for his contract was conditional (provided the capital was subscribed for), and that condition had not been performed or waived.

The directors nevertheless commenced business; and the Company, having become embarrassed, on the 22nd of July, 1848, obtained an Act of Parliament, 11 & 12 Vict. c. ciii., for dissolving and facilitating the winding-up of its affairs. The calls for which this action was brought, were made under the provisions of that Act.

At the trial, it was contended, that the defendant was not a shareholder liable for calls within the meaning of the 11 & 12 Vict. c. ciii., as he had never executed the deed of settlement; the learned Judge was of that opinion. The plaintiffs, however, had a verdict for 233*l.*, leave being reserved to the defendant to move to enter a non-suit, if the Court should be of opinion that he was not liable as a shareholder or in any other character.

A rule nisi having been obtained;

Sir *F. Thesiger* and *Willes* shewed cause, citing *Hutton v. Thompson* (a), *Norris v. Cooper* (b), *Fox v. Olifton* (c), *Pitchford v. Davis* (d), *Dickinson v. Valpy* (e), 7 & 8 Vict. c. 110, ss. 3, 7, 26; and 11 & 12 Vict. c. ciii. ss. 5, 35.

Crowder and *Milward*, contra, cited *Wilson v. The Birkenhead, Lancashire, and Cheshire Junction Railway Company* (f).

Cur. adv. vult.

The judgment of the Court was now delivered by

PARKER, B.—In this case the point reserved on the trial before my Lord Chief Baron was, whether the defendant was a shareholder, and liable to contribute to the debts of the Company, under the Act 11 & 12 Vict. c. ciii. (local

(a) 3 H. L. Cas. 161.

(b) Ibid.

(c) 4 M. & P. 676.

(d) 5 M. & W. 2.

(e) 10 B. & C. 128.

(f) 6 Exch. 626.

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and personal), passed for the purpose of winding up the affairs of the Company. The defendant had applied for and obtained an allotment of shares; he had paid the deposit upon them, but had not executed the deed of settlement of the Company, or any deed referring to it. The capital of the Company was to consist of 500,000*l.*, in 50,000 shares. That amount never was subscribed; but the Company began business with less, and, not succeeding, the Act of Parliament, 11 & 12 Vict. c. ciii., was passed, for the purpose of winding up the concern.

That Act recites the deed of settlement, and that, at the time of its execution, the number of shares actually taken, holden, or at the disposal of the directors, was not 50,000, but 45,407 only, of which 25,000 were considered as fully paid up, and the rest in part only; that the Company was completely registered; that 51,652*l.* remained unpaid on the 20,407 shares; that, in consequence of irregularity in the proceedings of the Company and directors, doubts were entertained as to the power of the Company to enforce, without expensive litigation, the payment of the total amount remaining unpaid; that the Company was in pecuniary embarrassments; that, in the then present state of the affairs of the Company, the liability of each shareholder apparently exceeded the nominal value of his shares; that, in the deed of settlement, no provision was made for the existing condition of the Company; and that it was necessary to wind up their affairs. It then proceeds to enact, by sect. 1, that the Company shall be dissolved; by sect. 8, that the 20,407 shares, mentioned in the second schedule to the deed of settlement, shall be deemed remaining to be paid up on; and provides, by sect. 29, that the directors may, when they shall think fit, call up and compel payment of such sums of money or instalments of capital in respect of 25,000 and 20,407 shares as they shall think necessary, at certain intervals. Then follows a

clause (sect. 30) enacting, that, except as by that Act otherwise provided, every such call shall be made according to the provisions of the recited deed of settlement; and as regards the liability of the shareholders, the forfeiture of shares, and otherwise, shall be deemed to have been made under such provisions. Another clause, the 32nd, provides, that if, at the time appointed, any shareholder shall fail to pay the calls, the Company may sue such shareholder. The form of the declaration is then given; and, by sect. 34, it is enacted to be sufficient to prove at the trial, that the defendant was a holder of shares at the time of the call; and, by sect. 35, the production of the register of shareholders of the Company shall be *prima facie* evidence of such defendant being a shareholder, and of the number of his shares; and at the end of the Act (sect. 54), there is this proviso: "Provided always, and be it enacted, that this Act, or anything therein contained, shall not, except so far as is therein expressly enacted, render liable to any creditor of the Company or any person having or alleging any claim or demand against the Company, the Company or any shareholder or other person, if the Company or such shareholder or other person would not have been so liable if this Act had not been passed, or render liable to any call, contribution, debt, claim, or demand, the Company or any shareholder or other person, if the Company or such shareholder or other person would not have been liable thereto if this Act had not been passed."

It appears from the deed itself, that, amongst the subscribers holding shares, parcel of the 20,407 in the second schedule mentioned, is the defendant's name; and if the statute had enacted that those who are named as shareholders in the second schedule should be compelled to pay, this express enactment, however unjust, would have rendered the defendant liable, and he would not have been exempted, though otherwise not liable, under this clause.

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But there is no such express enactment; and it certainly would be most unjust if there had been. Nor is it implied that those named in the deed as shareholders, who did not execute it, should be obliged to pay. The statute enacts, (sect. 29) that the directors shall call for money or instalments on so many, both of the 25,000 and 20,407 shares, as shall exist, and makes the shareholder (that is, the real shareholder), who fails to pay such calls, liable to an action, but it leaves the question open, who is a shareholder.

Who then is such a shareholder? In the interpretation clause (sect. 5) the word "shareholders" is declared to mean the shareholders of the Company, and to include former shareholders and their representatives. By the Act 7 & 8 Vict. c. 110, under which this Company was completely registered, the word "shareholder" is by the interpretation clause (sect. 3) declared to mean "any person entitled to a share in a Company, and who has executed the deed of settlement, or a deed referring to it;" and this meaning it is to bear, so far as it is not excluded by the context, or by the nature of the subject-matter. By sect. 25, the shareholders are incorporated; and sect. 55 gives a remedy to recover calls against the shareholders. Under this Act of Parliament, a shareholder, therefore, must be one who has subscribed the deed of settlement, or a deed referring to it, unless there is something in the context to give it a different meaning; and certainly there is nothing in that clause to give it a different meaning. But in the 26th section there is a provision, that "no shareholder of any Joint-stock Company completely registered under this Act shall be entitled to receive any dividends or profits, or be entitled to the remedies or powers hereby given to shareholders, until he shall have executed the deed of settlement of the Company, or some deed referring thereto, and also have paid up all instalments or calls due from him, and shall

have been registered in the Registry Office aforesaid." In this last section, the word "shareholder," by reason of the context, may have a different interpretation, but not in the other part relating to the enforcement of calls. The argument used by the plaintiffs' counsel, that this clause shews that a shareholder may be liable to calls before he has executed the deed, does not appear to us to be of any weight. The meaning is, that a shareholder who has executed must nevertheless pay calls before he is entitled to share profits.

From these references to the Acts of Parliament, it is no doubt clear that there was a *primâ facie* case against the defendant, of his being a shareholder within the meaning of the latter Act, as his name was on the register, which is made *primâ facie* evidence. But we think, that, on the facts in proof in this case, that *primâ facie* case was rebutted, and the defendant was not a shareholder liable to calls under the private Act. First, because that Act applies to shareholders only, and shareholders are, by the general Act 7 & 8 Vict. c. 110, those who have executed the deed; and by sect. 30 of the private Act, the liability of shareholders to calls is to be according to the deed of settlement, which could attach on those only who signed it. Again, the private Act expressly provides, that no one shall be made liable by it who would not have been liable if the Act had not passed. By the general Act, shareholders only, that is, those who executed the deed, were liable. The object of the private Act appears to us merely to give greater effect to the provisions of the deed, and to extend its operation against the parties to it only. As it appears in evidence in this case, that the defendant never did execute the deed, and therefore was not a shareholder in the proper sense, the *primâ facie* evidence of the register is rebutted.

But secondly, if this view of the construction of the private Act be wrong, and it extends to shareholders, that is,

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subscribers, or persons who have taken shares, and who have not executed the deed, we still are of opinion that the defendant is not liable. His agreement to take shares in a concern which was to have a capital of 500,000*l.* is, upon the authority of many cases, see *Pitchford v. Davis*(a), a conditional contract, i. e. provided that capital is subscribed for; and unless that condition is performed or waived, the defendant is not a "shareholder," in the sense of a person having agreed to take shares. Then, although the register is *primâ facie* evidence that the defendant was a shareholder, the fact of the agreement to take shares having been conditional is proved in the case, and also the non-compliance with that condition, for the private Act shews that less than 50,000 shares were taken. This, we think, proves that he was not bound to take the shares, unless the plaintiffs proved affirmatively that the defendant waived the condition, and agreed to take shares in a concern with less capital than 500,000*l.*, which was certainly not done.

We think, therefore, that the rule should be absolute to enter a nonsuit.

This is the judgment of my Lord Chief Baron, my Brother *Alderson*, and myself; my Brother *Martin*, however, entertains some doubt on the second point.

Rule absolute.

(a) 5 M. & W. 2.

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IN THE HOUSE OF LORDS.

HENRY SMITH BRIGHT, Appellant; and JAMES HUTTON,
Respondent;

June 21st,
22nd, 26th,
& 28th.

AND

JAMES HUTTON, Appellant; and HENRY SMITH BRIGHT,
Respondent:

In the Matter of THE JOINT-STOCK COMPANIES WINDING-UP
ACTS, 1848 & 1849;

And of THE DIRECT BIRMINGHAM, OXFORD, READING, AND
BRIGHTON RAILWAY COMPANY.

THESE were appeals, the one presented by an alleged contributory of the above-named Company, and the other, a cross appeal, presented by the Official Manager of the same Company, against orders made by Lord *Cranworth*, (then Vice-Chancellor), at the request of both parties, but without argument, with the view of submitting the questions therein involved to the judgment of the House of Lords (a). These appeals now came on to be

The promoters of a projected Railway Company, provisionally registered, issued a prospectus setting forth the objects of the Company, and a list of the names of the provisional committee, in

which that of A. was included. At a provisional meeting of the committee, resolutions were passed appointing a managing committee, amongst others, one giving them authority to allot shares. A. was not present at the meeting, but a copy of the resolutions was alleged to have been forwarded to him. On the 14th of October, A. accepted shares, which were duly allotted to him, and he paid the deposit. On the 30th of November, a petition for a bill not having been presented to Parliament, the scheme was abandoned. An order was afterwards made for winding-up the Company. The Master found, that A. was liable to bear his rateable proportion of the expenses between the 14th of October and the 30th of November, and directed a call against A. of 10*l.* per share. The Master's report having been (for the purpose of appealing, but without argument,) confirmed by Lord *Cranworth*, (then Vice-Chancellor), A. appealed, on the ground that the order made him liable for too much. And the official manager appealed, on the ground that the order made A. liable for too little. The appeals having been set down to come on together:—*Held*, by the House of Lords, adopting the opinion of the Judges summoned to attend, that an Association, such as the one before them, was within the Winding-up Acts, if the Court of Chancery thought proper to apply those Acts; *that* the order of the Court making A. liable to contribute to a call be reversed; *that* the appeal of the official manager be dismissed; *that* A. was not liable to any contribution beyond the deposit which he had actually paid; *that* a person only becomes liable as a contributory in respect of any contract he may have entered into, not in respect of any particular character he may have assumed; *that* there is no equitable, as distinguished from legal liability.

(a) These appeals came on to be heard on the 6th of August, 1851; but the further consideration was postponed by their Lord-

ships to the following session, in order to have the assistance of the Judges, who were then absent on circuit.

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heard before their Lordships and ten of the Judges who had been summoned to attend (a). The facts were as follow:—

In the year 1845, a Company or Association was formed for the purpose of constructing a Railway from Birmingham to Oxford, and thence to Reading and Brighton, for the conveyance of goods and passengers. The capital of the Company was to be 2,000,000*l.*, divided into 80,000 shares of 25*l.* each, upon each of which shares a deposit of 2*l.* 12*s.* 6*d.* was to be paid.

The Company was provisionally registered pursuant to the 7 & 8 Vict. c. 110, intituled "An Act for the Registration, Incorporation, and Regulation of Joint-stock Companies," by the name of "The Direct Birmingham, Oxford, Reading, and Brighton Railway Company."

A prospectus was printed, published, and circulated amongst the public by the promoters of the Company, containing the names of divers persons, and amongst others that of H. S. Bright, as being the provisional committee of the Company; and also containing a statement of the objects of the Company, and inviting the public to apply for shares therein. On the 2nd of October, 1845, H. S. Bright wrote a letter to the secretary of the Company, requesting to know what number of shares had been allotted to the directors.

On the 8th of October, 1845, a meeting of the provisional committee was held at the offices of the Company, in Moorgate-street, at which a committee of management, consisting of fourteen members of the provisional committee, was appointed; and resolutions were passed, that, until an Act of Parliament should be obtained, the affairs of the Company should be under the control of the managing di-

(b) The Lords present were The Lord Chancellor (Lord St. Leonard's), Lord Truro, Lord Brougham, and Lord Cranworth. The Judges present were the Ba-

rons Parke, Alderson, Platt, and Martin; and the Justices, Maule, Wightman, Erle, Williams, Talfourd, Coleridge, Crompton, and Cresswell.

rectors, to whom power was given to allot shares, and to apply the funds of the Company in payment of all expenses incurred in its formation and in the preparation of the plans and sections to be submitted to Parliament.

A copy of the resolutions passed at that meeting was directed to be sent to each member of the provisional committee, and was, as it was alleged, though not admitted, forwarded to H. S. Bright.

The several persons who had been so appointed the managing committee accepted, and took upon themselves, the office and duties of such managing committee, and employed solicitors, agents, surveyors, engineers, and other persons to do and perform the acts necessary to be done in and about the formation of the Company, and the preparation of the plans, sections, and books of reference required by the Standing Orders of the Houses of Parliament, to be deposited on or before the 30th November, 1845, in order to the obtaining an Act of Incorporation in the then following Session of Parliament.

On the 9th of October, 1845, a meeting of the managing committee was held, at which meeting a resolution was passed, "That the provisional committee have 100 shares each." And on the 10th of October, 1845, the secretary of the Company sent a circular letter to each member of the provisional committee, and, amongst others, to H. S. Bright, informing him that 100 shares in the Company had been appropriated to each member of the provisional committee, and requesting to know whether he would accept the same, or any, and what number thereof. And on the 14th of October, 1845, H. S. Bright sent to the secretary a letter in reply to the circular, accepting the 100 shares; and on the 18th of the same month, 100 shares were duly allotted to him, and he paid the sum of 262*l.* 10*s.*, the deposit thereon.

Of the 80,000 shares, 67,630 were allotted; but the deposits were paid on 4,295 shares only, and it consequently became impossible to proceed with the undertaking, and

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the same was abandoned before the petition to bring in a bill to Parliament had been presented.

Some only of the members of the provisional committee who had accepted the 100 shares apportioned to them, paid the deposit on such shares, or made any payment or contribution on account of the expenses incurred in the formation of the Company; and the members of the committee of management and some of the members of the provisional committee had been called upon to pay, and had paid, large sums of money in liquidation of the expenses, but the sums so contributed had been unequal in amount.

On the 21st day of December, 1849, an order was made by his Honour, the late Vice-Chancellor of *England*, for the dissolution and winding-up of the said Company, under the provisions of the Joint-stock Companies Winding-up Acts, 1848 and 1849; and Mr. *W. Brougham*, the Master in rotation, to whom the winding-up of the affairs of the said Company was referred, on the 28th day of January, 1850, appointed James Hutton the official manager of the Company.

H. S. Bright was settled by the Master on the list of contributories, as a member of the provisional committee who had accepted 100 shares in the Company.

In the prosecution of the order for winding-up the affairs of the Company, considerable costs and expenses had been incurred; and the Court of Chancery had made several orders for payment of costs out of the estate of the Company, by the official manager; and the costs so ordered to be paid already taxed amounted to nearly 200*l.*, and the costs and expenses of the winding-up of the affairs of the Company already incurred exceeded the sum of 2063*l.* 11*s.* 6*d.*

There had been no sum of money whatever received by the official manager, nor was there any estate of this Company to be collected or received, other than such as should be raised by calls on the contributories.

The Master made his report, dated the 13th day of June, 1851; and annexed thereto was a schedule of the expenses incurred, shewing a total of 10,174*l.* 11*s.* 5*d.*, which was divided into columns, setting out the amount of expenses incurred between certain dates. The expenses in respect of which the Master held that H. S. Bright was liable to contribute, were in the said schedule stated to have been incurred between the 14th of October (the day on which he had sent the letter accepting 100 shares) and the 30th of November, 1845 (the day on which the project failed). The total of such expenses amounted to 4562*l.* 10*s.* 7*d.*; and the Master thereby found that H. S. Bright, and the other members of the provisional committee who had accepted shares in the Company, were legally liable to bear and pay a rateable proportion, according to the number of shares held by them, of the necessary expenses of launching the common concern, incurred between the 14th of October, 1845, and the 30th of November, 1845; and that each of the contributories was legally liable to bear and pay a rateable proportion of the costs of the winding-up, according to the number of shares held by him in the Company; and he thereupon made an order for a call of 10*l.* per share upon each of the contributories in the said Company, including the said H. S. Bright.

On the 3rd of July, 1851, H. S. Bright moved the Court, before Lord *Cranworth*, (then Vice-Chancellor), that the Master's order for a call might be discharged; and upon the hearing, on the same day, the official manager moved the Court, before the same Vice-Chancellor, that the Master's report, so far as it declared that H. S. Bright was legally liable to bear and pay his rateable proportion of the necessary expenses of the Committee in preparing the launch of the common concern, incurred between the 14th of October, 1845, and the 30th of November, 1845, both inclusive, being the sum of 4562*l.* 10*s.* 7*d.*, might be reversed; and that it might be declared that the said H. S. Bright was liable to bear a rateable proportion of the said ex-

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penses incurred between the said 14th of October and 30th of November, 1845, and, in addition thereto, to bear a rateable proportion of the expenses incurred before the 14th of October and subsequently to the 30th of November, 1845, down to the abandonment of the Company, being the further sum of 5612*l.* 0*s.* 8*d.*

Upon hearing the motions, the Vice-Chancellor refused to make any order on either of them, but directed the official manager to pay H. S. Bright his costs of both applications.

On the 21st of June, the learned Judges having been summoned, and eleven (*a*) of them being in attendance, Mr. *Cooper* opened the proceedings on behalf of H. S. Bright, when Lord *Truro*, who then presided, said, that it was the wish of the House that counsel should address their arguments to the questions—First, whether a projected Railway Company, provisionally registered, came within the Winding-up Acts; and, if so, secondly, whether H. S. Bright was, under the circumstances of this case, a contributory, and to what extent.

The counsel for both parties submitted, that the first question was not before the House, the order for winding-up this Company not being the subject of any appeal. That, if the House now undertook to consider that question, it would be assuming, not an appellate, but an original jurisdiction.

Lord *TRURO*.—Supposing this to be an action for contribution, a Court of law would think itself competent to discuss the question, whether the defendant was liable at all, before it entered upon the question of how far he was liable; and this House may consider it necessary to be satisfied that there was jurisdiction in the Court below to make the order, before it fixed the amount of liability.

(*a*) The Judges present were, *Maucl, Wightman, Erle, Williams, Barons Parke, Alderson, Platt, Talfourd, and Crompton.* and *Martin*; and the Justices

Lord BROUGHAM said, that the House was not bound, by the form of appeal, as to what questions it should put to the Judges.

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The House was accordingly adjourned, to give counsel time to prepare their arguments on the first of the two questions; but such argument to be limited to one counsel of a side.

The appeal now came on to be heard. The Lords present were the *Lord Chancellor*, Lord *Brougham*, Lord *Truro*, and Lord *Cranworth*. The same Judges attended as on the previous day.

June 22nd.

Mr. *C. P. Cooper* (with whom was Mr. *Morris*), for H. S. Bright, contended, that a number of persons trying to obtain an Act of Parliament for the formation of a Company were not within the provisions of the Winding-up Acts. That the Courts had felt themselves bound by the decision of the late Lord Chancellor (*a*), but complained of the evil which orders in such cases had produced: *Ex parte James* (*b*). That the Courts of law had differed from the Courts of equity, and had refused to apply to these associations the law of partnership: *Walstab v. Spottiswoode* (*c*). That the Joint-stock Companies Registration Act (7 & 8 Vict. c. 110), did not contemplate the registration of inchoate Companies, but, in the first and second sections, mentioned Companies "constituted," "regulated," and "established." That that Act was never intended to apply to cases where no joint liability existed. That the next Act, which followed the Registration Act, intituled "An Act to facilitate the dissolution of certain Railway Companies," (9 & 10 Vict. c. 28), was in like manner limited to perfect Companies, that is, to all cases in which, by deed or otherwise, a substantive partnership had been created. That the Act to amend the former Acts (11 & 12 Vict. c. 45), by the 1st section, declared, "that this Act shall apply to all Companies, corpo-

(*a*) Lord *Cottenham*. (*b*) 1 Sim., N. S., 140. (*c*) Ante, Vol. 4, p. 321.

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rate or unincorporate, within the provisions of either of the two Acts first hereinbefore mentioned, and to all Companies, associations, and partnerships, whereof the capital or the profits is or are divided or to be divided into shares, and such shares transferable without the express consent of all the co-partners;" and the word "Company" in the interpretation clause was declared to mean "any partnership, association, or Company, corporate or unincorporate." That, but for the Act 12 & 13 Vict. c. 108, "An Act to amend the Joint-stock Companies Winding-up Act, 1848," the orders would have been, without doubt, limited to complete Companies; but that Act declared "that, notwithstanding any thing in the said Act (1848) contained, importing a more limited application thereof, the same should apply to all partnerships, associations, and Companies, whereof the partners or associates are not less than seven in number, whether incorporated or unincorporated, and whether formed or subsisting before or after the passing of the said Act or this Act, other than and except Railway Companies incorporated by Act of Parliament." That the extensive words of this Act had permitted the Court to make winding-up orders in cases which were never intended to be within their scope. That the basis of such orders was a joint liability to debts, and a consequent liability to contribute; whereas the Courts of law had determined, that no such joint liability to debts had existed between persons forming such inchoate or projected Companies: *Lefroy v. Gore* (a), *Hunter v. Hunt* (b). That the equitable depended on the legal liability, and could not be considered separately; and that the principle of contribution was referable to the legal liability. That the same principles were maintained with regard to insurances (c) and suretyship: *Cowell v. Edwards* (d), *Browne v. Lee* (e).

(a) 1 J. & L. 571, 581.

(b) 14 L. J., N. S., C. P., 113.

(c) Park on Insurance, tit. General Average; Arnould on In-

surance, Vol. 2, p. 877.

(d) 2 B. & P. 268.

(e) 6 B. & C. 689.

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also cited, to shew that the language of the 12 & 13 Vict. c. 108, had been considered by three different Courts to be comprehensive enough to embrace all partnerships, associations, and Companies consisting of more than seven members, whether so associated for profit or otherwise, and clearly therefore to embrace such a projected Company as the present.

Mr. *Cooper*, in reply, contended that there had never been any Company or association in this case, but a mere project, which had never been started. That the cases of *Nockells v. Crosby* (a), and *Williams v. Pigott* (b), shewed that there was not in this case any joint liability among the members; and that the Acts referred to were not intended to alter the existing law.

The LORD CHANCELLOR, with the consent of the House, then submitted the following statement and question for the opinion of the Judges:—

A Railway Company was projected and provisionally registered by the promoters. A prospectus was published, containing a list of the provisional committee, which consisted of more than seven persons, appointed with their own consent; in which prospectus it was proposed to establish a Railway Company, with a capital of 2,000,000*l.*, in shares of 25*l.* each. A meeting of more than seven of the persons whose names had been inserted in the prospectus as provisional committee-men was held, at which a provisional committee and also a managing committee were appointed, each consisting of more than seven persons, nominated with their own consent. At that meeting, it was resolved to establish the Company, as proposed by the prospectus, for constructing the Railway therein mentioned, and to apply for an Act of Parliament to establish such Company, and to procure the necessary plans &c. for that purpose. 5000 shares were allotted to different persons,

(a) 3 B. & C. 814.

(b) Ante, Vol. 5, p. 544.

in various numbers; but 500 only were accepted by the allottees. It was ultimately found to be impracticable to procure subscribers for a sufficient number of shares to enable the parties to carry the project into effect; and it was, therefore, by an order under the Winding-up Acts, ordered that the Company should be dissolved. Question—Are the provisions of those Acts applicable to this case?

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The Judges having requested time to consider,

Mr. Baron PARKE, on a subsequent day, read the following opinion:—In answer to your Lordships' question, I have to state, that we are of opinion that the persons who acted together for the purpose of obtaining an Act of Parliament to make a Railway in the manner therein stated, were a Company or Association within the meaning of the Joint-stock Companies Winding-up Acts of 1848 and 1849; and that the Association of those persons may be dissolved and wound up under the direction of the Court of Chancery, if that Court consider that it is fit and proper that it should be so dealt with.

The first of these two Acts, 11 & 12 Vict. c. 45, reciting the previous Act of 7 & 8 Vict. c. 111, and the Irish Act 8 & 9 Vict. c. 98, and the 9 & 10 Vict. c. 28, and the propriety of amending them, and giving further facilities for the dissolution and winding-up of Joint-stock Companies and partnerships, enacts, that the Act shall apply to all Companies corporate or unincorporate within the provisions of the two first-mentioned Acts; to other Companies not material to the present inquiry; and, lastly, to all Companies, associations, and partnerships, to be formed after the passing of that Act, whereof the capital or the profits is or are divided or to be divided into shares, and such shares are transferable without the express consent of all the co-partners; and, by section 2, to all associations and Companies formed for the purpose of working mines, and benefit societies not certified and enrolled.

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By the interpretation clause, the word "Company" in the Act is to mean any partnership, association, or Company, corporate or unincorporate, to which the Act applies. The body of persons or association in question is not within the latter part of the first section above referred to, for it has no stock divisible into shares. Whether it is within the former, 7 & 8 Vict. c. 111, is a more doubtful question. It clearly does not fall within the other Act referred to, for that is an Act confined to Ireland.

The 7 & 8 Vict. c. 111, comprises in it various Companies. It embraces commercial or trading Companies incorporated, of which this is not one; but it also applies to any Company or body of persons associated together for commercial or trading purposes to which privileges have been granted under the 7 Will. 4 & 1 Vict. c. 73, or which is registered provisionally or completely under the 7 & 8 Vict. c. 110.

Now, this is not a Company or body of persons associated together directly for commercial or trading purposes (if the making of a Railway be such a purpose, which may be questioned); the immediate object of this association is not the making of a Railway, but the obtaining an Act to enable them to do so, after subscriptions have been obtained and a Company has been formed; but, as the Act speaks of such a body being provisionally registered as a condition, and a complete Company practically never is, the probable meaning of the section is, that a body of persons associated to obtain an Act of Parliament to enable them to act as a Company for commercial or trading purposes, whose ultimate though not immediate purpose is commercial or trading, is within this Act; and, if so, it would be within the 11 & 12 Vict. c. 45, as that Act is expressly made applicable to every Company within the provisions of the former Act 7 & 8 Vict. c. 111.

If the question depended upon this Company or association being within the 7 & 8 Vict. c. 111, we should have to decide whether the construction of a Railway were a "commercial or trading purpose;" but it is not necessary to

do so. It is, however, material, as it seems to us, to shew, that an association of promoters may be dealt with by the Court of Chancery for the purpose of being wound up, if their object is to form a Company for commercial or trading purposes. The statute 9 & 10 Vict. c. 28, shews this more clearly. It provides, s. 1, that when any persons or Companies, before that Act, should have entered into a subscription contract, or any other agreement or agreements, in writing or otherwise, for the formation of a Company or partnership for making any Railway, which could not be carried into execution without obtaining the authority of Parliament, and in respect of which no Act had been obtained, it should be lawful for such persons or Companies to dissolve the Company or partnership contract or agreement, whether such contract or agreement contained any provisions for the dissolution of the Company or partnership intended to be thereby formed, or not. And that statute provided, that it should be lawful for the committee, provisional directors, or other persons, by such contract or agreement intrusted with the management or carrying on of the undertaking, to call a meeting, to ascertain if the Company should be dissolved, and whether such dissolution should be deemed an act of bankruptcy, in which case the affairs of the Company should be wound up under the provisions of the 7 & 8 Vict. c. 111, otherwise as an ordinary partnership.

No such proceeding appears to have been taken in the case supposed in your Lordships' question, and therefore that particular statute is not applicable to it. But the statute shews, that an undertaking by projectors to form a future Company is capable of being dealt with under the 7 & 8 Vict. c. 111, as a Company; and may have its affairs wound up and settled by the Court of Chancery under section 22 of that Act, if that Court shall think fit. It does not follow that every case of projectors of an intended Company ought to be, or would be, so dealt with.

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This statute was followed by the 11 & 12 Vict. c. 45, which extended the operation of the prior Winding-up Acts, and gave the Court of Chancery the power, on the application of a contributory by petition to the Lord Chancellor or the Master of the Rolls, to order the dissolution or winding-up of the Company or association therein referred to, not merely in case of bankruptcy, but in case of insolvency, or a judgment or decree against the Company unpaid, or on a proceeding by a creditor of the Company, or if any other matter or thing should be shewn, which, in the opinion of the Court, shall render it just and equitable that the Company should be dissolved. This statute, as has been before stated, does not in terms embrace this Company, unless it be a Company or body of persons formed for commercial or trading purposes under the 7 & 8 Vict. c. 111; and it contains many provisions which are inapplicable except to regularly formed Companies.

In the case of provisional committees, or the projectors of a Company, it is now perfectly well settled law, and acted upon in every Court of law in Westminster Hall, that there is no partnership between them, no common power of binding each other merely by such a relation; each binds himself by his own acts only. There are, therefore, very few creditors of such a body collectively, though many of one, two, three, or more of the acting individuals who compose the committee or are projectors; and so there may be a series of contracts to which there are different contributories, according as they have been authorised by different persons, very few binding all, and those only upon the rare accident of each individual authorising that particular contract. These inchoate undertakings have generally no joint estate, effects, or credits, of which there can be a manager (11 & 12 Vict. c. 45, ss. 19, 20). No person can have a judgment or decree against the whole body, except in the rare case that all the projectors have jointly contracted; so that no proceed-

ings could be taken under that statute, section 5; nor are there any contributories of the entire Company, except in the extraordinary case of all having contracted; for contributories are those only who have contracted by themselves or agents with a creditor, or who have agreed to indemnify or repay, in part or in all, those who have contracted with the creditor on their own account.

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We consider the law to have been most correctly laid down by Lord *Cranworth* in *Carrick's case* (a). All the questions of contributories resolve themselves into two simple questions of fact. First,—by far the most frequent occurrence,—did the alleged contributory make, or authorise to be made, the contract in respect of which he is called on to contribute on his account jointly with others; or, secondly, if any one or more entered into the contract in his or their own behalf, did he agree to indemnify the person or persons contracting, in part or in all, against the consequences of that contract.

The machinery of this Act, 11 & 12 Vict. c. 45, is undoubtedly not well adapted to such a case. This statute was followed by the 12 & 13 Vict. c. 108, passed to amend the former: by which it is enacted, that, notwithstanding anything in that Act importing a more limited application thereof, the same shall apply to all partnerships, associations, and Companies, whereof the partners or associates are not less than seven in number, whether incorporated or unincorporated. This statute renders all liable, whether their purposes were commercial or not.

We think that the term “association” is applicable to such a body of persons as is described in your Lordships’ question. That body would, we think, have been within the 11 & 12 Vict. c. 45, if its object had been commercial, the only question on that Act being whether a railroad fell within that description.

(a) 1 Sim., N. S., 509.

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The object of the 12 & 13 Vict. c. 108, was to extend the former Acts, upon which a more limited construction was put. This body would clearly have fallen within the 9 & 10 Vict. c. 28. We are of opinion, therefore, that it was meant to be comprised in the class of "associations." It is perfectly true that some of the provisions in this statute, as well as the bulk of those under the former, are applicable only to partnerships and Companies which have a joint-stock capital and credits, whose members are united together with a common purpose of making joint contracts, who, for that purpose, are bound by the agency of one another, or by that of one or more common agents, be they directors or officers, and who would necessarily have become contributories bound by such joint contract.

Although these provisions are inapplicable generally to the cases of projectors of different Companies, there may be cases in which they or some of them are capable of being applied with advantage, entirely or partially; and we think it is for the Court of Chancery to decide—which it has undoubtedly a discretion to do under the 11 & 12 Vict. c. 45, s. 12—on each application, whether the particular concern is one to which it will, under all the circumstances, be proper that the Act should be applied.

We think this consideration affords an answer to an objection which appeared at first sight to present a formidable difficulty, that there are associations comprehended in those which we consider to be within the Winding-up Acts, to which there would be a great difficulty and inconvenience in applying the Acts. At the same time, it may be observed, that there are others to which they may with convenience be applied.

We answer your Lordships' question by stating, that the proposed case is one to which the Winding-up Acts may be applied if the Court think fit, not one to which the Court must apply them.

The LORD CHANCELLOR.—The learned Judges have now given their opinion, in which, as at present advised, I entirely concur, viz. that this is a case which may fall within the Winding-up Acts, if the Court of Chancery think fit to apply those Acts to it. The great point in the opinion which has been delivered, in which I entirely concur, is, that every word in the Acts of Parliament in question must be construed according to its natural import; and, though it is very difficult, I admit, to bring within the Acts some of the cases which by this construction come within them, yet it would be impossible to give the natural effect to the words of these Acts if you were to come to a contrary conclusion. The opinion, therefore, is one with which your Lordships will probably declare your entire concurrence; but as this case came before you on the merits, and as the point on which the opinion of the Judges has now been delivered was merely a preliminary one, I should propose that your Lordships should adjourn the further consideration of the appeal in order that it may be heard at your bar upon the merits.

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Lord BROUGHAM approved of the course proposed, observing, that, if the Judges had expressed an opinion that the case was not within the Winding-up Acts, and the Lords had concurred in it, it would have been unnecessary probably to have proceeded further with the case; but that, at present, he saw good reason for going on with the argument on the merits.

The Judges were again summoned: and being in attendance, Mr. *Cooper* (with whom was Mr. *Morris*) proceeded with the argument on the merits on behalf of Bright (a).

June 28th.

(a) The Lords present were the Lord Chancellor, who presided, and Lord *Brougham*, Lord *Campbell*, and Lord *Cranworth*.

Barons *Parke*, *Alderson*, *Platt*, and *Martin*; and Justices *Cole-ridge*, *Maule*, *Cresswell*, *Erle*, *Tal-foord*, *Williams*, and *Crompton*.

The Judges in attendance were

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The object of the present appeal is not to determine whether Bright is to be placed on the list of contributories or not, but whether he is compellable to pay more than the deposit on the shares in respect of which he has been declared a contributory; or whether, if an action had been commenced against him, he could have been compelled to pay more than 2s. 6d. in respect of every 25l. share, or at all events more than the proportion of expense which the number of shares he proposed to take bore to the whole number of shares to be issued by the Company. The first question to be determined is, whether there is a partnership between Bright as a member of the provisional committee and the members of the managing committee. This seems to have been decided in the negative by *Hutton v. Thompson*(a) and *Norris v. Cottle*(b). But the case of *Hutton v. Upfill*(c), on the authority of which Bright was put on the list of contributories, does not establish this; nor does the case of *Ex parte Mansfield*(d), in which Lord Cottenham founded his judgment, not on the party being a member of an association or partnership, but on the legal liability arising from his own acts.

The Registration Act (7 & 8 Vict. c. 110, s. 23) limits the deposit of shareholders in an association provisionally registered to 10s. in the 100l., and the committee are not authorised in receiving or expending one shilling more. If they do so, they do it at their own risk. The question then arises, whether the provisional committee-man has rendered himself liable at law; if he has not, then there is no equitable liability: *Lefroy v. Gore*(e). Now, in such an action, Bright may have a separate defence to that of any other member of the provisional committee, and every case must stand on its own grounds. No liability was created by being a member of the provisional com-

(a) Ante, Vol. 6, p. 708.

(b) Id., p. 317.

(c) Id., p. 338.

(d) 2 Mac. & G. 57, 66.

(e) 1 J. & L. 571.

nittee save the legislative contract (if any) under the Registration Act; neither is Bright liable for the costs of the winding up as found by the Master; for, according to the case of *Ex parte Hunter* (a), he is only to bear a share of the costs proportionate to his liabilities. In this case there is nothing whatever to shew that Bright authorised the managing committee to incur expenses; and if it be held that there is no partnership, then there is no authority originally implied; and if no authority, then no liability.

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Mr. Bethell (with whom was Mr. Roxburgh).—There are three propositions put forth on the other side: First, it is said, that if Bright is a contributory he has already paid his share, and is, therefore, liable for nothing. Secondly, that, if he is a contributory, he is only liable to contribute in the ratio which the number of shares taken by him bears to the whole number into which the capital of the Company when formed was to be divided, and that this proportion is also to apply to the costs of the winding up. And thirdly, that Bright is only liable for 2s. 6d. in respect of each share taken by him. On the other hand, the official manager appeals from the Master's report, complaining that he has limited Bright's liability within certain dates; whereas, he says, he ought to have found Bright liable in respect of the whole, as having embarked in a common concern as it then stood, and thereby having adopted all debts and liabilities from the commencement. There is no difference between the relative position of the persons on the lists. The managing committee were part of the provisional committee; they were appointed by the provisional committee to act for them, and, in common with that body, had 100 shares allotted to each of them. The question, therefore, whether they are liable pro ratâ or per capita is not material, since they are equally liable. The

(a) 1 Sim., N. S., 435.

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definition of "contributory" as given by the 11 & 12 Vict. c. 45, is, "Every member of a Company, and also every other person liable to contribute to the payment of any of the debts, liabilities, or losses thereof." You cannot limit the liability without confounding the status of a body of men in an Association like the present with that of shareholders in a formed Company. In a formed Company there is a liability proportioned to the shares taken; in an Association the members are all embarked in one boat to reach a given object, and must all bear an equal burden of the labour and expense. The only ground for the decision in *Upfill's case* was, that the two antecedents, being a provisional committee-man and taking shares, warranted the conclusion of law that there had been an implied authority given by the provisional committee to the managing committee to act for them. If this be law, then Bright has given his authority to the managing committee, and is equally liable with them. It is a mistake to suppose that Bright's liability commenced with his entering the Association, or ended when the scheme proved to be abortive, viz. when the plans required by Parliament were not deposited; when he gave authority to the managing committee, he recognised the contracts they had entered into in respect of the concern, and became liable for all past expenditure: for that committee had already done certain acts, and incurred certain liabilities, in order to promote the very object which Bright had joined with them to effect. Was he to have the benefit of those acts, and not to bear his proportion of the expenses. Neither was it necessary that he should have profited by joining the Association, the expectation of profit was sufficient. This point was met by the judgment in *Hutton v. Upfill*, where it is said, "It is very possible that no profit might result to him; but, if any gain had been made, he would have had his share, and he could not withdraw at his option from the liability which the holding this beneficial

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chance of profit had imposed." By the Registration Act (9 & 10 Vict. c. 110, s. 23), when a Company is provisionally registered, the promoters can do certain acts; they can allot shares and receive deposits, which deposits may be expended in preliminary expenses. If the money paid by subscribers for shares is liable under the Act to preliminary expenses, can it be said that the subscribers themselves are not liable? [Lord *Campbell*.—But promoters and subscribers are two entirely distinct classes of persons; an allottee of shares comes within the description of shareholder.] But a provisional committee-man who accepts shares is, by the decision in *Upfill's case* (a), (which must be held to be binding) a contributory, and so a promoter. [Lord *Campbell*.—Where the question is a question of law only, the decision of this House is irreversible, but not where the question is one of law and fact.] This is, in fact, an association of promoters, who, by the Act referred to, are invested with the name of a Company; the allottee of shares, if also a member of the provisional committee, adopts and ratifies all antecedent engagements, and all acts done in conformity with the prospectus of the proposed Company. Subsequent ratification is equivalent to antecedent authority: *Ex parte Dale, re The Wolverhampton, Chester, and Birkenhead Junction Railway Company* (b). If there is any difficulty in fixing the legal liability, then I must deny the proposition in many cases that the legal is the measure of the equitable liability; for if he be in equity alone entitled to participate in the profits, then he is in equity alone bound to share the loss consequent on the failure of the scheme. Where a man becomes a member of an existing body, which has made certain progress towards the establishment of a trading concern, it is a different case from a man becoming a member of a concern already in active operation. In the latter, a balance of

(a) Ante, Vol. 6, p. 338. (b) 16 Jur. 207; S. C., 21 L. J., Chanc., 341.

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profit and loss can be struck from time to time; but, in the former case, the benefit is not attained, and can only be reached by a certain outlay, which is to be borne by all those who expect ultimately to reap the benefit. [Lord Campbell.—They can only be liable by reason of their contract, if a man has authorised another to act for him the principal is liable at law.] This is not a question of liability to creditors generally, in which the rule of law applies, that the contributors only are liable, but a question of the liability of promoters inter se. It is a question who is to bear the cost of launching the common concern for the common good; all are equitably bound, and Mr. Bright, as one of such promoters, must bear his share of loss, in the same manner as he would have reaped his share of the profits if the scheme had succeeded.

Mr. Cooper in reply.—*Hutton v. Upfill* (a) only decides one part of this case; it decides that a provisional committee-man, who is also an allottee of shares, is a contributory; but it does not decide what liability attaches to that character. If he has done any act, or given any authority, then he is liable in respect of such act and such authority, but not otherwise. Until the acceptance of shares on the 14th October, Mr. Bright does not come within *Upfill's case*, for he did not, before that time, fill the double character by which alone he is decided to be a contributory. By the decision in *Norris v. Cottle* (b) it is decided, that, merely in the character of provisional committee-man, he is liable neither at law nor in equity. The liability, if any, must be legal; there is no such thing as an equitable as distinguished from a legal liability: *Lefroy v. Gore* (c). Neither is Bright liable to pay any contribution to the other members of the committee; for unless he is jointly liable with them at law for a debt paid by them,

(a) Ante, Vol. 6, p. 338. (b) Id., p. 317. (c) 1 J. & L. 571.

they have no right to contribution. In this case, there is no joint liability at law. Again, Mr. Bright cannot be liable for any expenses incurred after the 30th of November, when the scheme failed by the non-delivery of the parliamentary plans.

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The Lord CHANCELLOR.—I propose, after stating the facts, to put a question to the Judges. The facts are as follow:—

In the year 1845, a Railway Company was provisionally registered pursuant to the 7 & 8 Vict. c. 110, intituled "An Act for the registration, incorporation, and regulation of Joint-stock Companies."

The capital of the proposed Company was to be 1,000,000*l.*, divided into 40,000 shares of 25*l.* each, upon each of which shares it was proposed that a deposit should be paid on the allotment thereof.

A prospectus, registered the 25th of September, 1845, was printed, published, and circulated amongst the public by the promoters of the said Company, containing the names of divers persons, and amongst others that of A., as the provisional committee of the said Company.

On the 8th of October, 1845, a meeting of gentlemen was held at the office of the said Company, at which a provisional committee, of which A. was one, and also a committee of management, of which A. was not a member, were appointed; and resolutions passed to the following effect, viz. That the prospectus issued as that of the provisional committee then read, should be approved and adopted; and, until an Act of Parliament should be obtained, the affairs of the Company should be under the control of the managing directors, to whom power was given to allot the shares, and to apply the funds of the Company in payment of all the expenses incurred in its formation and in the preparation of the plans and sections to be submitted to Parliament. A. was not present at the meeting of the

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8th of October, 1845; but it is stated in the report of the official manager, that it appears from the books of the Company that a copy of the proceedings and resolutions at that meeting was forwarded to each of the members of the provisional committee.

On or about the 14th of October, 1845, A. received from the secretary of the proposed Company a circular letter of the 10th of October, informing him that 100 shares had been appropriated to each member of the provisional committee; and on the 14th of October, 1845, A. wrote to the secretary a letter in reply to the said circular, stating that he was willing to take the 100 shares placed at his disposal as a member of the provisional committee. On the 18th of October, 1845, the secretary sent A. the letter of allotment of 100 shares to him, and he paid the deposit on the 100 shares allotted to him by the said letter of allotment, but he has paid no further sum on account of the said Company.

Thirty thousand shares only of the 40,000, of which the said Company was to consist, were allotted. The deposits were paid on 3000 only. No Act of Parliament was ever applied for to invest the said Company with the powers necessary to accomplish its object; and the undertaking was wholly abandoned.

The members of the managing committee accepted and took upon themselves the office and duties thereof; and expenses to a large amount were incurred by them in and about the formation of the Company; but A. did not authorise the incurring of any such expenses, nor was he present at any meeting of the said Company.

I then propose, my Lords, to ask the Judges the following question:—Do the facts above stated afford sufficient evidence at law to warrant a verdict that A. is liable to a creditor on the employment of the managing directors for work done necessary for obtaining the Act of Parliament?

The Judges having retired to consider the question, on their return, Mr. Baron *Parke* delivered their unanimous opinion:—

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All her Majesty's Judges who have heard the argument, are of opinion, that, but for the decision of your Lordships' House in *Hutton v. Upfill*, the facts above stated would not have warranted a verdict that A. is liable to a creditor on the employment of the managing directors for work done necessary for obtaining the Act of Parliament.

We consider that *Upfill's case* decided two points: First, of law; that similar evidence was such as was fit to be considered by a jury in determining the question of fact, that he was liable on the ground of having given authority, and therefore would have warranted a verdict against him. Secondly, it decided the question of fact, that Mr. Upfill had given the authority. Upon the former point, we consider your Lordships' decision to be binding upon every inferior Court, and, for that reason, answer the question in the affirmative; but for that case, we, upon other decisions, should have been of a contrary opinion.

The Lord CHANCELLOR.—My Lords, in this case in which you have just heard the opinion of the learned Judges, a question of great importance remains to be decided. It is, whether, under the facts stated, Mr. Bright was or was not liable to pay as a contributory. He paid his deposit; with regard to that, no question was asked of the Judges; the question was, as to his further liability. He was a provisional committee-man, and had shares allotted to him; and those shares he accepted, and on them he paid a deposit, but he did no further act.

Now, I understand the Judges to be of opinion, that, independently of *Upfill's case*, there was nothing arising out of those facts which would have made Mr. Bright liable to a creditor for business managed, carried on, or ordered by

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the managing committee, towards completing the projected undertaking, and converting the association into a regular Company.

My Lords, *Upfill's case* may be considered, as the Judges have considered it, as a mixed case of law and fact; and it, therefore, may not be so difficult to deal with it as it might otherwise have been. At the same time, I should venture to state as my opinion, that, although you are bound by your own decisions as much as any Court would be bound, so that you could not reverse your own decision in a particular case, yet you are not bound by any rule of law which you may lay down, if, upon a subsequent occasion, you should find reason to differ from that rule; that is, that this House, like every other Court of Justice, possesses an inherent power to correct an error into which it may have fallen.

In regard to the point decided in *Upfill's case*, I must state to your Lordships, that I believe there is scarcely one Judge who has been called upon to decide this question—and every Court has been resorted to—who has not differed from himself in regard to the points decided. There was so much of novelty in the establishment of a provisional committee: there was so little of law to direct the opinions of lawyers upon it: and there was such a leaning in favour of a quasi partnership and an implied responsibility, that I am sure your Lordships will not be surprised if, in *Upfill's case*, as in many others I could quote, there may have been a departure from that which may now be considered to be the settled rule.

I believe that the general opinion now is, that the answer which has been given by the learned Judges is that which your Lordships ought to follow, viz. that Mr. Bright in this case would not be liable to an action. If you follow that rule leaving *Upfill's case* as depending upon a matter of fact or law, just where you found it, you will decide this case upon the facts existing here, and

upon the question submitted on those facts to the learned Judges; and on them you will give your judgment.

I should, therefore, propose, without going further into detail (after the opinion just delivered), that your Lordships should dismiss the appeal of the official manager requiring Bright to pay a larger sum than he has hitherto been charged with, and should reverse the order of the Court below, which holds him to be liable to contribute to the call of 10*l*. The consequence of reversing the one and dismissing the other would be, that Mr. Bright would, from this time, be held not to be liable to any contribution in this Company beyond the deposit which he actually paid.

LORD BROUGHAM.—When I advised your Lordships in *Upfill's case*, I had the concurrence of a very high authority, the late noble and learned Lord *Cottenham*, who not only went entirely with me in the advice that I tendered to your Lordships, and which you were pleased to accept in that case, but went a great deal further, as I stated at the time, than I was disposed to go, in admitting the liability of a party under similar circumstances. I, therefore, felt no hesitation whatever in arriving at the conclusion I did in *Upfill's case*, and which I advised your Lordships to adopt.

Whether I should have altered that opinion now, had I considered the question open, it would be superfluous for me at present to say. The learned Judges, to whom the question has been submitted, have given an unanimous, and, I may say, an unhesitating opinion, that this question, which they say is a question partly of law and partly of fact,—but which, in my opinion, is much more a question of fact than one of law,—they have given their opinion upon that to the extent that the evidence of a man being a provisional committee-man, and of his having shares allotted to him by his own consent, indeed at his

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request, would not be sufficient to warrant a verdict in an action at law brought against him for moneys expended by the managing committee in that concern.

The learned Judges having given this opinion, it is not for me to say whether I agree with them or not. It would be superfluous in me to say I agree with them, it would be unbecoming in me to say that I differ from them. It is enough for me to say that I entirely approve of the course recommended under the circumstances by my noble and learned friend on the woolsack (viz.) the affirmance of one appeal and the reversal of the other.

LORD CAMPBELL.—My Lords, I rejoice very much that this matter of the liability of contributories is now put upon what I think is its right footing. I never could understand why, if it was considered a pure question of law, persons who stood in both capacities, of provisional committee-men and allottees of shares, were on that account to be liable as contributories.

The law does not know what is the meaning of provisional committee-men; yet they have been talked of in our Courts, their liabilities have been considered and dealt with, and their powers made the subject of discussion, and their liabilities treated of as arising from those powers, as if the character were as well known to the law as tenants for life or tenants in tail.

I consider this as a matter of contract; a person can become liable as a contributory in respect of the contract he has entered into, not in respect of assuming a particular character. The question of contract will depend upon the facts of the case, not merely on the party being a provisional committee-man; and then the only question of law will be, whether there is evidence to submit to a jury to consider whether a contract has been proved; for, whether it has or has not is matter of fact, and to be decided as matter of fact.

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Now, I say that I entirely concur in the opinion delivered by her Majesty's Judges; and I think that, in this case, the evidence is not sufficient to fix the liability of Bright; and that, if it had been laid before a jury, the plaintiff ought to have been nonsuited.

A difficulty arose here from *Upfill's case*; and if I considered that that case was expressly in point, I must say, with the most sincere respect for the opinion of my noble and learned friend on the woolsack, I should hesitate in advising your Lordships to decide against it; because, according to the impression upon my mind, a decision of this High Court upon a point of law is conclusive upon the House itself, as well as upon all inferior tribunals: for I consider it the constitutional mode in which the law is declared; and that, after such a judgment has been pronounced, it can only be altered by an Act of the legislature.

My humble opinion is, that this House cannot decide one thing as law to-day, and decide the same thing differently as law to-morrow; because that would leave the inferior tribunals and the rights of the Queen's subjects in a state of uncertainty: and, after there has been a solemn judgment of this House, laying down any position as law, I apprehend that that is binding upon the rights and liberties of the Queen's subjects, until it is altered by an Act of the Commons, the Lords, and the Sovereign. That is my present impression, though I state it with great deference, after a different opinion has been expressed by my noble and learned friend.

I do not think, however, that I am precluded from concurring in the motion which has been made in this case, inasmuch as I do not consider *Upfill's case* as laying down any abstract point of law. That was an appeal from a Court of equity: your Lordships sat as a Court of equity to decide it. You took into view the facts and the law; and I consider, that, in what was laid down by my noble

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and learned friend with the concurrence of that illustrious Judge Lord *Cottenham*, when he talked of the liability of committee-men, he was stating his opinion upon a fact, and not upon any abstract point of law; but I do not think that *Upfill's case* prevents us from concurring in the motion of my noble and learned friend; and, therefore, in that I entirely concur.

LORD CRANWORTH.—The question now before your Lordships is in fact an appeal from an order made by myself; but, as I stated in the course of the argument, although the order was made by myself, it was made by the consent and at the suggestion or at the instance of the learned counsel, that I should confirm simply what the Master had done, in order that the question might be brought by way of appeal to your Lordships' House.

I believe, however, that upon that occasion, certainly, if not upon that, upon a great many similar occasions which were argued before me as Vice-Chancellor, I expressed my very strong doubts whether *Upfill's case* could have been rightly considered or rather rightly interpreted by the profession; or, if so interpreted, whether it was a decision which could be acted on. What was thought was, that *Upfill's case* had decided, as matter of law, that persons under certain circumstances, viz. persons who, being members of a provisional committee, agreed to take shares in the projected Company, necessarily became liable in point of fact to whatever demands might be lawfully made on the acting members of that committee.

Now, it appeared to me impossible that that could have been the intention of the House, that this House could have intended to decide that such a combination of circumstances necessarily rendered a person in point of fact liable to anything. The decision, however, was so interpreted, and, being so interpreted, I acted on it.

I rejoice that the matter has been brought before the

house; because I cannot help thinking, that the opinion which has now been delivered unanimously by the Judges in such very clear and distinct terms, will go far to settle doubts that have created enormous expense, and anxiety beyond measure, in the winding up of several abortive companies.

I concur with my noble and learned friend in not thinking that we need treat this case as necessarily at variance with *Upfill's case*, because *Upfill's case* was a mixed decision of law and fact. I confess, that, treating it as a question of fact, the conclusion at which your Lordships arrived was not that at which I should have come, if I had then had the honour of a seat in your Lordships' House. The decision come to was on a case which was an appeal both from law and fact; but, be that as it may, the opinion now delivered by the Judges seems to me to set us free to do that which is just between the parties now before us.

The Judges are distinctly of opinion, that, but for that decision, there was nothing here on which the case could be left to a jury, to say whether Mr. Bright was or was not responsible. If he was not responsible had the matter been brought before a jury, he was clearly not responsible in equity.

I think it necessary to advert to one of the arguments addressed to your Lordships from the bar, viz. that, although not responsible at law, Mr. Bright might be so in equity. I know of no such distinction. He was liable, if at law, by virtue of a contract; if there was no contract, he was not liable at all. If there was a contract, he was liable both at law and in equity. The decision of the Judges leads clearly to the inference that he was not liable at law, in other words, that there was no contract, and, if so, he was not liable in equity. The result will be, as my noble and learned friend on the woolsack has moved, that the appeal of the party complaining of the order making him liable will be allowed, and the order appealed

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against be reversed. On the other hand, the appeal which seeks to render the party liable to a greater extent than he was held liable below, will be dismissed.

COURT OF CHANCERY.

BEFORE VICE-CHANCELLOR PARKER.

*July 20th &
21st.*

**THE GREAT NORTHERN RAILWAY COMPANY v. THE EAST
AND WEST INDIA DOCKS AND BIRMINGHAM JUNCTION
RAILWAY COMPANY, and H. MARTIN.**

**By an Act of
Parliament
passed in 1846,
and by a sub-
sequent Act
passed in 1850,
the Great
Northern Rail-
way Company
were empower-**

THIS was a motion for an injunction to restrain the defendants from interfering with the plaintiffs in making a junction from the Great Northern Railway to the East and West India Docks and Birmingham Junction Railway, according to the plans prepared by Mr. Cubitt, the

ed to make a junction with the East and West India Docks and Birmingham Junction Railway Company, and that Company were to afford facilities for effecting such junction; and the plans were to be submitted to, and to be approved by the engineer for the time being of the said Company; and in case of difference between the engineers of the two Companies, it was provided that the same should be determined by an umpire, to be named by such engineers; or, in case no such umpire should be appointed for twenty-one days after notice, then by an umpire to be appointed by the Railway Commissioners. Both the Companies were respectively incorporated by Acts of Parliament passed in 1846; the plaintiffs' Act receiving the Royal Assent a few days earlier than that of the defendants. Each of the Companies had power to purchase a long strip of land running parallel with the defendants' Railway as afterwards constructed.

In the year 1852, and after the powers of the plaintiffs to take land compulsorily had ceased, they gave notice to the defendants of their intention to form a junction, and submitted plans for that purpose to the engineer of the defendants' Company.

The defendants, having purchased the strip of land over which it was necessary that the works of the plaintiffs should be constructed in order to form a junction, refused to approve the plans, alleging that the plaintiffs could not compel the defendants to give up their land to enable the plaintiffs to make a branch Railway over it. It being impossible for the plaintiffs to effect a junction except by passing over this land, they thereupon filed their bill, and now moved for an injunction to restrain the defendants from interfering with the plaintiffs in making a junction, and from withholding all proper facilities for effecting the same.

Held, that, upon the completion of their line, or within a reasonable time afterwards, the defendants were bound to allow the plaintiffs to traverse their land, and to afford facilities for the junction; and that the expiration of the plaintiffs' compulsory powers to take land did not affect their right to use so much of the defendants' land as they might require for the purposes of their Act, by way of easement, but not as actual owners.

That the Court has jurisdiction to settle the plan of junction, if the mode of settling it provided by the Act cannot be carried into effect.

The injunction was granted accordingly.

plaintiffs' engineer, or otherwise according to some other fit and proper plan for that purpose; and to restrain the defendants from withholding from the plaintiffs all proper facilities for effecting such junction, and for the transfer of goods, and for the accommodation of passengers and goods coming from one of the lines of Railway to the other; and also from preventing the plaintiffs from using the defendants' Railway from the point of junction when made to the East and West India Docks, and all the branches, stations, reservoirs, and works belonging thereto, with their engines and carriages, according to the provisions of the East and West India Docks and Birmingham Junction Railway Act, 1846, and the East and West India Docks and Birmingham Junction Railway Branches and Amendment Act, 1850.

The bill, filed in July, 1852, stated, that, by the East and West India Docks and Birmingham Junction Railway Act, 9 & 10 Vict. c. cccxcvi., which received the Royal Assent on the 26th of August, 1846, the defendants thereby incorporated were authorised to construct a Railway passing through the parish of St. Mary, Islington, and there crossing over the plaintiffs' line by a bridge above the level of the plaintiffs' Railway.

That, by the 55th section of the defendants' Act, it was enacted as follows: "That the Company hereby incorporated shall afford to the passengers and goods conveyed by the Great Northern Railway to the Railway hereby authorised to be made, all needful facilities and accommodation for the conveyance of such passengers and goods along the last-mentioned Railway, upon terms and conditions as favourable as are granted by the Company hereby incorporated to any other Railway Company; and shall also afford facilities for effecting a junction between the same Railway and the Great Northern Railway, and for the transfer of goods between the said Railways: Provided always, that, in settling the terms and conditions upon

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which passengers and goods are to be conveyed, and the facilities and accommodation are to be afforded, regard shall be had to the similarity of the circumstances of each respective Company." And it was by the 56th section enacted as follows: "that the plans for effecting any such junction, and for the transfer of goods between the said Railway and the Great Northern Railway, before the commencement of the works, shall be submitted to and approved of by the engineer for the time being of the said Company; and all works connected with such junction, or in anywise relating thereto, shall be under the control of the said engineer for the time being of the said Company: Provided always, that, if any difference of opinion shall arise between the said engineer and the chief engineer for the time being of the Great Northern Railway Company, touching the said works, the same shall be determined by a third engineer, to be named by such two engineers before the said works are commenced."

That, by the 28th section of the defendants' amended Act, 13 & 14 Vict. c. xxxvi., it was enacted as follows: "That it shall be lawful for the Great Northern Railway Company to form a junction and add such side lines and works in connection with the said Railway at any point west of Maiden Lane as may be necessary for connecting the Great Northern Railway with the said Railway, and as the said Great Northern Railway Company may be authorised to make, so as to allow of the passage of engines and carriages from one Railway to the other, and as may be necessary for the reception and accommodation of the traffic of the said Great Northern Railway Company passing on, to, or from the said East and West India Docks and Birmingham Junction Railway, such junctions, side lines, and works being made under the superintendence and to the satisfaction of the engineers for the time being of the East and West India Docks and Birmingham Junction Railway Company; and it shall be lawful for the said

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Great Northern Railway Company to use the same Railway from the point of junction therewith to the East and West India Docks, and all the branches, stations, reservoirs, and works belonging thereto, with their engines and carriages, subject to the bye-laws and regulations of the Company having control of the said Railway, and to such other terms, conditions, and regulations as may be agreed on between the said two Companies, or in the event of difference between them, then by the engineers-in-chief of the said two Companies, or by an umpire to be named by such engineers; or in case no such umpire should be appointed before the expiration of twenty-one days after notice from one such engineer to the other to appoint such umpire, then by an umpire to be appointed by the Railway Commissioners."

That, by the 29th section of the same Act, it was enacted as follows: "That all trucks of the Great Northern Railway Company, which shall be brought to the point of junction between the said two Railways for the purpose of being conveyed therefrom to the East and West India Docks, or either of them, or which shall be loaded at the said Docks or either of them, for the purpose of being conveyed therefrom to the junction, shall, in case the said Great Northern Railway Company shall so desire, be so conveyed by the Company or their lessees working the said Railway, as part of, and together with, their own luggage trains, at such times and subject to such terms, conditions, and regulations, as in the event of difference between the said two Companies shall be settled by such engineers or such umpires as aforesaid."

The defendants having constructed their Railway and works, and completed and opened their line on the 12th of January, 1852, the plaintiffs' engineer sent the defendants' engineer, H. Martin (who was also a defendant in the present suit), a letter, as follows: "With this I forward a plan and section of a junction, which, on the part

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of the Company, I propose to make between the goods station of this Railway and the East and West India Docks and Birmingham Junction Railway. I submit it for your consideration; and, if approved, would feel obliged by your putting the matter in proper train, and by your letting me hear from you thereon. The necessary signals for insuring the safe use of this junction I should be happy to concert with you at any time." Inclosed were the plan and section referred to in the letter.

The engineer of the defendants' Company, by letter of the 19th of the same month, acknowledged the receipt of the plan, and at the same time said: "I shall be able to suggest some alterations, which I think an improvement on your plan."

On the 16th of February following, the secretary of the defendants wrote to the secretary of the plaintiffs a letter, which, after acknowledging the receipt of the plaintiffs' plan, was in the following words: "I am desired to acquaint you, that the question has been considered; and it appears that the Great Northern Railway Company have no power to make the junction referred to." The plaintiffs' solicitors, by letter, referred the defendants' solicitors to the clauses in the Act by which they conceived they had the power to make the junction; whereupon the defendants in answer, on the 28th of February, wrote as follows: "We apprehend there could be no doubt as to your power to make the junction under the clauses in the Act, provided your powers for the compulsory purchase of the land which lies between your property and our Railway had not some time since been allowed to expire. This land, you are probably aware, was purchased under reference by our clients from St. Bartholomew's Hospital, at an exceedingly heavy cost, and we presume it is to this point that the secretary's letter refers."

The land referred to in the last-mentioned letter as lying between the plaintiffs' property and the defend-

ants' Railway extended over a distance not exceeding two hundred yards, being a strip of land lying parallel to and nearly along the defendants' Railway, and consisted of land, which, by the Great Northern Railway Act, 1846, the plaintiffs were authorised to take for the general purposes of their Railway, with a provision that their powers for the compulsory purchase of land for the purposes of that Act should not be exercised after the 26th of June, 1851.

The bill alleged, that, under these circumstances, the expiration of the compulsory powers of the plaintiffs was immaterial, and created no objection to the right of the plaintiffs to effect their proposed junction.

Then followed a correspondence between the solicitors of both parties, which resulted in the defendants not taking any notice of the plaintiffs' communications; whereupon they addressed several letters to the defendant, H. Martin, the engineer of the defendants' Company, calling on him to return the plans approved, with such alterations as he might require.

The bill alleged also, that the defendant, H. Martin, refused to approve any plan for effecting the junction, or further to interfere in the matter, until the defendants had agreed with the plaintiffs to permit the junction; and that the defendants refused to allow the defendant, their engineer, to approve of a plan, on grounds wholly insufficient and invalid; and that, by such refusal, the plaintiffs were precluded from exercising the powers given to them by the Acts of Parliament of effecting a junction; and that the plaintiffs had never required the defendants to sell to them any part of the land which they had taken for the purposes of their own Railway and works.

The bill, after praying, that, under the circumstances therein stated, the omission and refusal of the defendant, H. Martin, to approve of a plan for effecting the said junction, might be declared to be a fraud on the plaintiffs, pro-

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ceeded to pray that the Company might be restrained by injunction in the manner hereinbefore stated in the notice of motion; and that all proper directions and orders might be given for enabling the plaintiffs to carry into full effect the powers given to them by their Acts.

The plaintiffs, by their affidavits filed in support of the motion, stated, in addition to the facts set down in the bill, that they did not, and had never required the defendants to sell to them any part of the land which the defendants had taken for the purposes of their own Railway and works; and that the time limited by the Great Northern Railway Act for the construction of their works did not expire until the 26th of June, 1853.

That the land alluded to in the correspondence as lying between the plaintiffs' property and that of the defendants extended over a distance not exceeding two hundreds yards, and was a strip of land lying parallel to and nearly along the defendants' Railway, and consisted of land, which, by the Great Northern Railway Act, 1846, the plaintiffs were authorised to take for the general purposes of their Railway; with a provision that their powers for the compulsory purchase of land for the purposes of that Act should not be exercised after the 26th of June, 1851; and which same lands the defendants were, by the first-mentioned Act, also authorised to take for the purposes of their Railway.

That the defendants had given notice to take such land before any notice had been given by the plaintiffs, though during the time that the plaintiffs' compulsory powers were in force; and that, at the time of the passing of the Act of 1850, the whole of the land in question had been taken by the defendants.

The plaintiffs' Railway was opened to Peterborough in 1849; and the East and West India Docks and Birmingham Junction Railway was completed and opened to the public in May, 1851.

The plaintiffs now moved for an injunction in the terms given at the outset of this report.

Mr. Bethell, Mr. Wigram, and Mr. Denison, in support of the motion, contended, that the plaintiffs were not only entitled to effect the junction contemplated by the Act, but to pass over any of the defendants' land for that purpose. That the uses to which the strip of land had been applied could not be allowed to interfere with the formation of the junction; but that, even if they did, the defendants' works and Railway were all subject to the obligations imposed by the statute under which they had been made. That the Act of 1850, which passed after the defendants had taken possession of the piece of land, clearly indicated the power of the plaintiffs to effect the junction, notwithstanding the occupation by the defendants; and it also defined the exact locality at which it was to be made, and gave other powers which the former Act had omitted to do. That the plaintiffs were under no obligation to pay any price at all for the right to traverse the piece of land in question, because it had been acquired subject to the conditions imposed by the statute, viz. the right of entry of the plaintiffs. That the defendants should not be permitted to evade an Act of Parliament by purchasing a piece of land not required for the purposes of their Railway, but merely with a view to obstruct the junction contemplated by the Act; and that an injunction mandatory in its nature, and similar to that in *The Great North of England Railway Company v. The Clarence Railway Company* (a), should be granted by the Court.

Mr. Rolt, Mr. Daniel, and Mr. Speed contra, contended, that the plaintiffs had at that time no right to compel the defendants to consent to the formation of a junction; and

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that, if they had such right, it could not be enforced by a motion for an injunction. That, in the first place, the scope of the Act was not to enable the plaintiffs to make a branch Railway over the defendants' land, but to compel them to receive their traffic upon their line, and convey it as favourably as for any other Company. That the power to form a junction might have included a power to cross the small strip of land lying between the outer rail and the foot of an embankment, or the usual boundary of the Railroad; but could not mean that the plaintiffs were enabled to avail themselves of a large piece of land, which had been acquired by another Company for the purposes of a station or other works connected with their Railway, to make a branch line to the point of the proposed junction. That the plaintiffs could not effect a junction until they had brought their line up to that of the defendants; and that they had lost that power by their own negligence in not exercising it. That the case of *The Great North of England Railway Company v. The Clarence Railway Company* (a), shewed that one Railway Company had no power to occupy any portion of the land belonging to another Company without their consent, although they had a statutory power to cross it by means of a bridge.

That the assertion made on the other side as to the power of the plaintiffs to take the defendants' land without compensation, was a proof of the intention of the legislature. It was never supposed, that the plaintiffs were to occupy the defendants' land to an unlimited extent, under a simple power granted to them to form a junction, without payment of any consideration. That the defendants had paid a very large sum of money for the small piece of land in question, and, if taken by the plaintiffs, it would be utterly useless for the purpose of sidings or other works connected with the defendants' line, for which purposes

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it had been purchased. That there were no means under the special Act, or the Lands Clauses Consolidation Act, for fixing the compensation to be paid to the defendants; and it was against reason to suppose that the defendants were to have the land for nothing. That, as far as this land was concerned, the defendants were strangers to the plaintiffs, and not, as contended on the other side, mere trustees of it for their use. That the plaintiffs had had five years wherein to exercise their power of taking possession; and not having done so within the prescribed time, they could not now declare their intention arbitrarily, when the land had been appropriated for other purposes. That they had lost their right to interfere with the defendants' possession, and the Court would never enforce a power after a reasonable time had been given for the exercise of it, although it might appear to be unlimited in time and in extent. That the second Act did not enlarge the powers given to the plaintiffs by the first Act, but only reserved to them their former right, so long as their compulsory powers existed; and that the expiration of those powers must be considered the legitimate limit to the exercise of their right of forming a junction. That the Court could not, in the present state of the suit, grant an injunction, the title to which, in fact, depended, and was consequential upon, the establishment of a legal right. That the injunction was not to prevent any wrong which the defendants were actively inflicting on the plaintiffs, but was to prevent them from defeating an alleged right, by doing nothing. That there was no pretence of pressure or immediate loss. That the present application would, in effect, if granted, be a decision of the whole cause. That the ordinary interference of the Court on interlocutory applications was with the view of keeping things in statu quo, until the legal right had been established. That, in the present application, the interference

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of the Court would have the effect of immediately altering the state of things and the position of parties; and, if the balance of convenience and inconvenience were considered, it would appear strongly in favour of non-interference by the Court. For the granting this motion would greatly embarrass the traffic arrangements of the defendants, and the user of the Railway by the public. That the mode of junction not having been approved, the order, if made, must be vague, for the Court could not define in its terms the works to which the defendants were to submit. That an injunction, granted in the terms proposed by the notice of motion, must necessarily be inoperative for uncertainty, inasmuch as it would not point out the plan which the defendants were to consider. That, if, as the plaintiffs contended, the defendants were fraudulently withholding their approval, that was a subject to be decided at the hearing, and not upon an interlocutory application.

Mr. *Bethell*, in reply, contended, that the defendants, who were under an obligation to afford the plaintiffs the means of effecting a junction, could not set up an acquisition, made by virtue of the very Act of Parliament which imposed the obligation, as a reason and an obstacle for the non-fulfilment of it. That the junction contemplated by the Act was not limited to the point of intersection, but included the uniting line between the two existing Railways. That the "point of junction" was distinguished in several parts of the Act from the word "junction." That the silence of the Act with regard to the consideration to be paid for the land taken, could not operate to defeat the formation of the junction. That the branch line and junction were in fact considered in the light of a mutual benefit, and imposed a mutual obligation. That the expense of constructing the line was to be borne by the plaintiffs; and the use of the land and of all facilities in their power were

re contributed by the defendants. That, if the Court
 e of opinion that some compensation ought to be paid, it
 ld impose its own terms in granting the injunction. That,
 ependently of this, the words of the 28th section were
 e enough to cover this; for it provided for "any case of
 erence," which would include a difference as to the ex-
 se of construction, or any difference as to the manner
 hich such expense was to be borne by the several par-
 . That another way of providing for the payment was
 er the 68th section of the Lands Clauses Consolidation
 , which included every case not in terms provided for
 the antecedent sections of that Act. That the present
 er to form a junction was in fact analogous to a grant
 , right of way; and that the principle involved in all
 ts was, that everything necessary to the enjoyment of
 thing granted was by implication included in it.

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The VICE-CHANCELLOR,—after having in the course of the
 ly remarked that the Court constantly on interlocutory
 lications granted an injunction, that being in effect
 sole object of the suit, and that he should feel no dif-
 lty in granting an injunction on that ground, pro-
 led as follows:—In this case, the defendants were in-
 orated by an Act, which received the royal assent
 n the 26th of August, 1846, which authorised them to
 ke the East and West India Docks and Birmingham
 action Railway, and to acquire land for the purposes of
 t Act. [His Honour then read the 55th and 56th sec-
 is, see ante, pp. 357 and 358; and the 28th section of
 defendants' Act amending and enlarging their powers,
 e, p. 358.]

low, under those Acts of Parliament, the defendants
 e purchased lands and completed their Railway; and
 re can be no doubt that all the land which they have
 uired, and all the works that they have made under
 authority of those Acts, are subject to the provisions

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therein contained, one of which is that which I have read relating to the junction to be made between the plaintiffs' Railway and that of the defendants. Now, the junction is, in point of fact, a branch Railway; it is to be made by the plaintiffs, who have an absolute right to make it, as part of their undertaking; and the defendants are bound to afford them facilities for that purpose. The plan, according to which it is to be made, is to be submitted to the defendants' engineer, and to be approved by him. No doubt, in settling that plan, regard must be had to the convenience and interests of the defendants as far as is consistent with the absolute right of the plaintiffs to have the junction made, and reasonably adapted for the purpose required. Now, whatever the plan may be when its terms have been settled, it is absolutely necessary that part of the works for effecting the junction must be constructed upon the defendants' land. It is impossible that the junction can be effected without coming upon the defendants' land for the construction of the works; and when the Act provides that the defendants shall afford facilities for effecting the junction, it necessarily imposes upon them, as it appears to me, the obligation of allowing the plaintiffs to construct the necessary works upon the defendants' lands according to the plan as eventually settled. And if the defendants could lawfully withhold the use of their land for the purpose of constructing the necessary works, they would really have it in their power to prevent the junction, for which the Act provides, from being made.

It appears to me impossible to draw any distinction for this purpose between any one portion of the defendants' land and any other; for they have acquired, and they possess, the whole of their land for the purposes of their Act, and one of those purposes is, that the junction shall be made. At the same time, I consider that the plaintiffs are bound to acquire the land necessary for making the

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junction, that being a part of their work; and that they are bound to make the defendants compensation in respect of so much of their land as they may take and use for the purposes of the junction, and also in respect of any injury that may be done to the defendants in consequence of the works.

The plaintiffs have submitted to the defendants a plan, which shews that the proposed place of junction is where the defendants' line runs on an embankment. The defendants are of course possessed of the embankment, and they are possessed also of a narrow strip of land under the embankment ninety-five feet wide, which they have purchased of St. Bartholomew's Hospital. The plan proposed by the plaintiffs is to effect a junction, as I understand it, by an embankment to be made by them, and formed over the strip of land adjoining to the defendants' Railway.

The defendants refuse to consider or receive that plan, because they say that the plaintiffs, under the general compulsory powers in their Act, have no authority to compel them to sell the strip of land that I have mentioned. After considering what was urged upon that part of the case, I am of opinion that that objection cannot be sustained. I think it cannot be successfully maintained that the plaintiffs are not to be entitled to effect this junction, unless they can compel the defendants to sell the land necessary for making it under the compulsory powers of the plaintiffs' Act.

There are many considerations which lead to this conclusion—one is, that the objection assumes that the plaintiffs are not entitled to effect the junction, and the defendants are not bound to afford facilities for making it, unless all the defendants' lands that are necessary for the works are such as can be purchased by the plaintiffs under their compulsory powers.

Now, when you consider that the plaintiffs' Act, which defines the lands they are authorised to take compulsorily

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for the purposes of that Act, was first passed, and that the defendants' Act, giving them the ordinary power of deviation, subsequently received the Royal Assent, it might very well happen that the defendants might, under those powers, have constructed their line in such a way as to have made it physically impossible for the plaintiffs to effect the junction, except at some point not within the limits within which the plaintiffs had power to purchase lands compulsorily.

Again, the defendants had seven years by the first Act to make their Railway, and that time was extended by the second Act. The compulsory powers of the plaintiffs did not, as to any land, extend over more than five years, and, as to the land in question, expired in three years. Now, the plaintiffs could not consider their plans for forming the junction, or know what lands they would require for it, until the defendants' works were completed or were very near completion. It appears to me, therefore, that, to put the construction upon the Act that has been contended for, would or might have the effect of making the provisions for forming a junction altogether illusory.

Then again, it seems to me to be very doubtful whether the plaintiffs have a right to purchase out and out such of the defendants' lands as are requisite for making the junction. It appears to me extremely probable that they have no right to take the land in any other way than for the purpose of making their works in the nature of an easement over this land. And there are no powers in any Act, that I am aware of, enabling one party to compel the other to give up their lands, except for the purpose of using them in the nature of an easement, that is, short of purchasing them out and out. Now, however that may be as to parts of the land, it seems to me it must necessarily be so as to the lands near the point of junction, because those lands, when the junction is made, are as necessary to the defendants for the purpose of their works as they are to the plaintiffs for the purpose of their's. And why should the plaintiffs

be enabled to compel the defendants to sell to them lands which are to be used for the purpose of a junction, and, when so used, remain just as necessary to the defendants for supporting their Railway and carrying on their works as they are for the works of that of the plaintiffs? It appears to me, that certainly, as to part, if not as to all of the land, the plaintiffs have no compulsory power which would enable them to compel the defendants to sell those lands out and out.

The true construction of the Act appears to me to be this, that, upon the completion of the defendants' line, or at least within a reasonable time afterwards, the defendants are bound to afford facilities for the junction, and they are bound to do this whether the lands requisite for the works are or are not within the plaintiffs' compulsory powers, or whether the compulsory powers of the plaintiffs have or have not expired. The plaintiffs, for the purpose of making the junction, must of course procure the necessary land. It may very well be, that, as regards other landowners, they have no occasion to revert to their compulsory powers, because they may be willing to sell; but I think it is impossible for the defendants, who are under the obligation by the Act to afford facilities, to say that they will not furnish the necessary lands unless the plaintiffs have the right to take them under their compulsory powers.

It appears to me, therefore, that the plaintiffs are entitled to effect the junction and to construct the works according to a plan to be settled,—according to the Act, if possible; but, if it cannot be settled according to the Act, it must be settled by this Court. I entertain no doubt as to the jurisdiction of this Court to settle the plan, if the mode of settling it prescribed by the Act cannot be carried into effect.

This case is not like those in which there is no agreement between the parties, except one resting on a reference to arbitration. If one man contracts to buy another's

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land, and the price is to be fixed by arbitration, there is really no contract until the arbitrator has given out his award; but when there is a contract which has been in part performed, which I think this must be considered to be, the Court will not allow a party to avoid the performance of that part of the contract which is incumbent upon him, because it cannot be performed in the very way that the contract prescribes, especially where the want of power to perform it in that way is consequent upon the defendants' own acts. If it is necessary to refer to any authority for that, there is a case of *Gregory v. Mighell*(a), which seems to shew the principle on which the Court acts in cases of that kind.

[The Vice-Chancellor then asked the defendants' counsel whether they approved or not of the plan which had been submitted to them by the plaintiffs' engineer; and proposed, that, if the defendants desired to have the plan again submitted to their engineer for his consideration, and if they would undertake to concur in appointing an engineer to act under the 56th section, then the motion should stand over.]

The defendants' counsel did not assent to this proposition; and, after some discussion, an order was eventually drawn up in the following form:—

The plaintiffs admitting, without prejudice to the defendants' right to appeal, if they shall be advised, that the plan marked A., for effecting the junction hereinafter mentioned, has been approved of by the engineer of the defendants, as a proper plan for that purpose, in case the plaintiffs are entitled to the said junction; and the plaintiffs undertaking to abide by any order this Court may make with reference to the compensation to be paid to the defendants by the plaintiffs, for the purpose of constructing the junction and works connected therewith hereinbefore mentioned. The plaintiffs, the Great Northern Railway Company, undertaking, before commencing the works, to pay into the Bank, with &c., the sum of 2000*l.*, to be there placed to the credit of this cause: Ordered—THAT, such payment being made, an injunction be awarded to restrain the defendants, The East and

(a) 18 Ves. 328.

India Docks and Birmingham Junction Railway Company, &c., interfering with the plaintiffs in making a junction from the plaintiffs' Railway to the defendants' Railway, according to the said and from withholding from the plaintiffs all proper facilities effecting such junction [until answer or further order. Then follow the usual directions for the investment of the said sum of 2000*l.*, cumulation of the dividends].

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BEFORE VICE-CHANCELLOR SIR J. PARKER.

Re HORNER'S ESTATE.

April 24th;
May 1st.

IN HORNER by his will devised certain real estates *via* his daughter for life, with remainders to other persons, and with an ultimate limitation to the right heirs of said daughter Maria.

1839, the Guardians of the West Ham Poor Law Act, under the general powers conferred by the 5 & 6 Will. 4, c. 69 (a), took a portion of the devised land for the

The purchase-money of land in settlement, taken under the powers of the 5 & 6 Will. 4, c. 69, from persons having a limited interest, is, for the purposes of devolution, realty and not personality.

The parts of sections 1 & 2, applicable to the present case, are as follow:—Sect. 1 enacts, it shall be lawful for any person for life to dispose of, by absolute sale, any lands or buildings for the purpose of the same being used as or converted into a workhouse, or of the same being used as the site of a workhouse, with the rights and appurtenances, and to convey the same and the fee simple and interest thereof unto the guardians or overseers of any union or parishes, and their successors, &c.

Sect. 2. And with regard to the application of money paid for the purchase of hereditaments of persons under disabilities enacted, that all sums of

money which shall be agreed to be paid to any person whose lands shall be limited in settlement for the purchase of hereditaments as aforesaid, shall, in case the same shall exceed 50*l.* and there shall be no person capable of giving a sufficient discharge for the same, be paid by the guardians and overseers into the Bank of England in the name and with the privy of the Accountant-General, to be placed in his account to the credit of the party who shall be so interested in the said hereditaments, subject to the order of the Court; which said Court, on the petition of the person making claim to any such money, is hereby empowered to or-

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purposes of their Union, and the purchase-money, amounting to 800*l.*, was paid into the Court of Exchequer, and, upon the petition of the tenant for life, was invested in 3*l.* 5*s.* per Cent. Reduced Annuities, and the dividends were ordered to be paid to Maria Horner for life.

Maria Horner died in January, 1852, having previously made her will and appointed executors, but without having specifically disposed of the purchase-money so invested. The ultimate remainder to the right heirs of Maria Horner having taken effect by the failure of the prior limitations, a question arose, whether the sum in Court belonged to the heir-at-law, or to the personal representatives of Maria Horner.

A petition was presented by the heir-at-law, praying that the money in Court might be transferred into his name, as being impressed with the character of real estate.

Mr. *Bristowe*, for the petitioner, contended, that the 1st and 2nd sections of the 5 & 6 Will. 4, c. 69 (a), did not in any manner affect the nature or devolution of the property, and that it remained the property of those entitled to the real estate.

Mr. *Prendergast*, for the personal representatives, contended, that the purchase-money of the land taken was, in fact, converted into personal estate: *Ex parte Flamank* (b).

der summarily the investment of such money in the purchase of real estates, to be settled to the same uses and upon the same trusts as the lands so sold were previously subject to, or in the public funds, and the distribution of the rents and dividends thereof respectively, according to the respective interests of the claimants thereof. And in case of doubts or questions of title to

any money paid into the Bank by virtue of this Act, the persons who shall have been in the possession of such hereditaments at the time of such purchase, and persons claiming under them, shall be deemed and taken to be lawfully entitled to such hereditaments until the contrary be shewn.

(a) See note, preceding page.

(b) 1 Sim., N. S., 260.

The VICE-CHANCELLOR.—I am of opinion that the Stock is money, subject to be invested in the purchase of land, and must be treated as real, and not as personal estate. The costs of this application must be according to the Act.

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BEFORE THE MASTER OF THE ROLLS.

GOODAY v. THE COLCHESTER AND STOUR VALLEY RAILWAY COMPANY.

April 30th.

THE bill in this case was filed in 1850, by J. C. Gooday, against the Colchester, Stour Valley, Sudbury, and Halstead Railway Company, (hereinafter called The Colchester Railway Company).

It stated, that, before the month of May, 1846, an undertaking was projected for making a Railway from the town of Colchester to Sudbury, which was intended to pass through certain lands of the plaintiff, and negotiations were then commenced by the plaintiff with certain of the promoters, and P. B. Philbrick, their solicitor and agent, on behalf of the said intended Company, for the sale to them, upon behalf of the Company, or to the said intended Company, of the plaintiff's lands upon the terms mentioned in a certain indenture of the 31st of March, 1846. That, in pursuance of the covenants contained in the said indenture, the plaintiff assented to a bill for incorporating the said intended Company, which was then pending in Parliament, and to the best of his ability aided

An incorporated Railway Company promoted a bill in Parliament, to obtain powers to make an extension line. A landowner opposed, but withdrew his opposition in consequence of an agreement to purchase his land, entered into and executed by a person, the solicitor of the Company, who professed to act as their agent. The agreement was not under the seal of the Company, and the person executing it had not been legally authorised by the Company to do so. The bill

passed into an Act, but the construction of the Railway was not proceeded with before the expiration of the compulsory powers of the Company. The time for the completion of the Railway had not expired when the plaintiff filed his bill against the Company for specific performance of the agreement:—*Held*, that, in the absence of any proof of the adoption of the agreement by the Company, or of their having received any benefit under it, the plaintiff was not entitled to a decree for specific performance, and that the Company were not compellable to admit the contract in an action at law for damages.

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and assisted in obtaining the said bill, and in and facilitating the progress thereof through both Parliament; and the bill passed into an Act, in the Company.

That, afterwards, the said Company intended Parliament for an Act to enable them to make extension of their line, to Melford and certain in the county of Suffolk, one of which proposition lines was to pass through the plaintiff's land he opposed such bill in Parliament; but, in order him to withdraw his opposition, and to sell company such of his land as would be required by B. Philbrick, as the agent and on behalf of the entered into negotiations; and ultimately, on May, 1847, an agreement for the purchase of the plaintiff's land by the defendants, and withdrawal of his opposition, was entered into by plaintiff and P. B. Philbrick, and was in the form:—

“Minutes of agreement made the 13th day of between J. C. Gooday and F. B. Philbrick, of the county of Essex, gent., on behalf of the Colchester Railway Company. In the event of the bill now before Parliament, for making an extension line of Railway from Bury to Melford, Lavenham, and Clare, passing the said Colchester Railway Company agree to and the said J. C. Gooday agrees to sell, all the parcel of land, being part of a field or inclosure Long Croft, for the sum of 1850*l.*, to be paid on the day of September, 1848, at which period possession of said piece or parcel of land is to be given to the Company, and the purchase is to be completed. The Company to pay interest after the rate of 5*l.* per centum from the said 29th day of September, 1847, in any cause whatever, the said purchase shall be completed. The Colchester Railway Company

ry greater quantity of the said field called Long Croft under the compulsory powers of their Act than that so marked out upon the plan annexed, and thereby agreed to be purchased; the said J. C. Gooday to build a nine inch brick wall of the height of six feet out of ground at the east, across the said field along the centre of the said line marked on the said plan. The said Railway Company to pay to the said J. C. Gooday the sum of 150*l.* upon the completion of the building of the said wall, such wall to be the property of the said J. C. Gooday, and he to keep the same in continual substantial repair. The said Colchester Railway Company to pay all expenses of and relating to this agreement, of abstracts, and of title and conveyance, and of every description, both those of vendor and purchasers. The said J. C. Gooday further agrees, when required, to withdraw his dissent and to give his assent to the said bill, and to render every reasonable assistance in his power to promote the aforesaid extension Railway to Milford, Lavenham, and Clare, and to take any such steps or proceedings for that purpose as the said Company may reasonably require, at the expense of the said Company. The said Company agrees to pay to the said J. C. Gooday, within one month after the said extension bill is passed into a law, his costs of opposition in the Commons to the said extension bill to Melford, Lavenham, and Clare, to the extent of 150*l.* The abstracts of title to the said piece or parcel of land hereby agreed to be purchased by the said Company shall be delivered to the solicitor of the said Company within two months after the passing of the said extension Railway bill into a law, and all objections to title shall be delivered to the solicitor of the said J. C. Gooday within two months from the delivery of the abstract, or all objections to be considered waived. A deed of covenant or bond for carrying out the above minutes to be prepared by Mr. E. W. G., for immediate execution by the above-named vendor and purchasers.

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A clause to be inserted in such deed of covenant or bond, to the effect, that, if the said Colchester Railway Company shall at any time deliver to the said J. C. Gooday, his executors, administrators, or assigns, a similar deed of covenant or bond to that above mentioned, under the common seal of the Company, expressed in the same terms and defeasible in the same events, then the former deed of covenant, bond, or other deed to be void and of no effect."

That the said agreement was signed by F. B. Philbrick, as the agent and on behalf of the defendants, and by the plaintiff's solicitor on his behalf; and in pursuance thereof the plaintiff withdrew his opposition to the bill, and the same passed into an Act on the 8th of June, 1847 (10 Vict. c. xi.), and thereby the defendants were authorised to construct the extension line, and for that purpose to take and hold the lands in the Act mentioned, which included those of the plaintiff, referred to in the minutes of agreement.

That a draft deed of covenant was, in pursuance of the covenant, prepared, and sent to and approved by the solicitor of the defendants on their behalf, but had not been returned or executed by the defendants.

The bill prayed, that the defendants might be decreed specifically to perform the said agreement, the plaintiff being ready and willing specifically to perform the same on his part; and that an account might be taken of what was due and payable to the plaintiff by the defendants for principal, interest, and costs on the footing of the agreement, and that the defendants might be decreed to pay the same.

The defendants, the Company, by their answer, admitted the statements in the bill, but denied that F. B. Philbrick had been duly authorised by them to act as their agent in the negotiation and agreement with the plaintiff, inasmuch as he had not been authorised under the seal of the Company, which the defendants submitted

was the only appropriate or effectual authority in that behalf. They further said, that they had never entered upon the land or into the receipt of the rents or profits thereof; that the plaintiff required the Company to purchase more land than they wanted for the purposes of their Act; and that his opposition to the bill had been solely to compel the Company to purchase his land on his own terms. That the Company had been unable to enforce the requisite calls so as to enable them to complete the said purchase, notwithstanding the ultimate sufficiency and solvency of their subscribers; but that they had been willing to pay the plaintiff interest on his purchase-money, and had applied to him to forego pressing for the immediate payment of the principal, but he had refused to do so, and had commenced proceedings in equity. That, under such circumstances, the defendants considered themselves justified in raising all legal objections, and therefore insisted that not only the agreement, the subject of the present suit, not having been entered into under seal of the defendants, being a corporation, was invalid; but that no authority under their seal had ever been given to the said F. B. Philbrick to enter into the same on their behalf, and the same was not a contract in writing entered into by the defendants or by any agent lawfully appointed in that behalf; and was not binding; and the defendants insisted on the benefit of the statute against fraud, in bar to the relief sought by the complainant's bill, in the same way as if they had pleaded the same.

The evidence did not shew that the Company had abandoned their intention of constructing their line, although they had not then sufficient funds for that purpose. The powers of the Company to take land compulsorily ceased on the 8th of June, 1850, before the filing of the bill; but the time for completing the Railway would not expire for six years after the passing of the Act, which would be on the 8th of June, 1853.

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Mr. Roupell and Mr. J. H. Palmer for the plaintiff.—

The only objection raised by the answer to the specific performance of this contract is, that it is not under the seal of the Company, and that it is therefore invalid; but when a corporation has obtained a benefit, or there has been part performance of a contract, such a defence will not avail them, and they will be bound in equity specifically to perform it, though it be not under seal. In *The Fishmongers' Company v. Robertson* (a), the withdrawal of opposition to a bill in Parliament was part of the contract, and the Company were held entitled to sue thereon, although not under seal; and so also in *Edwards v. The Grand Junction Railway Company* (b), *The London and Birmingham Railway Company v. Winter* (c), and *Stanley v. The Chester and Birkenhead Railway Company* (d). It cannot be successfully contended, that in this case the Railway Company cannot receive any benefit under the contract. This is not a case of abandonment, for they have still sufficient time for the completion of their Railway, and they may take and use the plaintiff's land for that purpose, and get the entire benefit, which, under the agreement, they had power to receive. At all events, they must admit the contract in an action at law for damages. The following cases were also cited:—*Winne v. Bampton* (e), *Macher v. The Foundling Hospital* (f), *Maxwell v. The Dulwich College* (g), *Marshall v. The Corporation of Queenborough* (h), *Wilmot v. The Corporation of Coventry* (i), *Hawkes v. The Eastern Counties Railway Company* (k), *Rea v. The Inhabitants of Thruscross* (l), *Preston v. The Liverpool, Manchester, and Newcastle-upon-Tyne Junction Railway Company* (m).

(a) 5 M. & Gr. 131.

(b) Ante, Vol. 1, p. 173.

(c) Cr. & Ph. 57.

(d) Ante, Vol. 1, p. 58.

(e) 3 Atk. 474.

(f) 1 V. & B. 188.

(g) Cited in *Carter v. The Dean*

of *Ely*, 7 Sim. 211.

(h) 1 S. & S. 520.

(i) 1 Y. & C. 518, Eq. Ex.

(k) Before the Vice-Chancellor *Knight Bruce*, ante, p. 188.

(l) 1 A. & E. 126.

(m) Ante, p. 1.

Mr. *Lloyd* and Mr. *Goodave*, for the defendants, the Railway Company, being asked whether, if the Court should think proper to offer the same terms as in *Lord James Stuart v. The London and North Western Railway Company*(a), the defendants would be willing to accept them, submitted that the facts of this case were so different from that of the case mentioned, that they should not feel justified in doing so. They then contended, that, in this case there had been no recognition of the agency by the Company, and that they had never appointed any one by a valid instrument to act for them, with reference to this contract. That, by the 97th section of the Lands Clauses Consolidation Act, 1845, the only agreement which could bind a Company, was one under their corporate seal, which the present was not. That the Company had not received any benefit under the contract, or adopted it in any manner. That, in the present case, the consideration given was in one entire sum, and that the Court would not compel the Company to pay the whole consideration, when they could only obtain a partial benefit. That the Court would never enforce part performance of a contract. That, in the cases cited, the defendants, against whom specific performance had been decreed, had received positive benefit from their contracts; but, in the present case, all the advantage (if any) which the defendants derived, was from a negative act, viz. the withholding of the plaintiff's opposition.

Mr. *Roupell* in reply.—This case differs from *Webb v. The Direct Portsmouth Railway Company* in that the contract is not conditional on the making of the Railway, neither is it the act of a Company acting as a corporation, but as the promoters of a scheme then about to be submitted to the legislature, which, upon the new Company coming into existence, was binding upon them. The defendants might have the whole benefit of the contract, if

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(a) Ante, p. 47.

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they thought proper to construct their Railway; and the plaintiff was ready and willing to do every thing on his part to perform the contract.

The MASTER OF THE ROLLS.—I regret that, in the present state of the authorities, I cannot make a decree in favour of the plaintiff. There are two questions to be considered in the present case, first, whether there is any contract at all by the defendants for the purchase of the plaintiff's land, and, if it should be found that there is, what remedy this Court can give for the breach of it; and secondly, whether there is any contract between the plaintiff and a third party, of which the defendants have taken advantage, and by so doing have adopted.

Now, it is clear there is no contract between the plaintiff and the defendants, for, before they obtained their extension Act, they could not, as a Company, make any contract at all. Had there existed any such contract, then it has been settled as a rule of law by recent cases, that, assuming a contract to have existed between an individual and a Railway Company, and the undertaking to have been abandoned, the Court will, nevertheless, in the exercise of its discretion, send a case to law, instead of granting specific performance.

In this case, however, no sub-contract between the plaintiff and the defendants exists; and, indeed, it is immaterial whether such a contract does exist or not, if there was a good and valid agreement between the plaintiff and a third party, of which the Company had received the benefit, and which they had, by their acts, adopted and ratified.

The cases of *Edwards v. The Grand Junction Railway Company* (a) and *Preston v. The Liverpool, Manchester, and Newcastle upon Tyne Railway Company* (b) establish the principle, that, wherever a third party enters into a contract with the plaintiff, and the defendants take the benefit of

(a) Ante, Vol. 1, p. 173.

(b) Ante, p. 1.

it, they are bound to give the plaintiff the advantage which he bargained for.

Here then, the question is, whether the defendants did adopt the agreement previously entered into by their agent or alleged agent with the plaintiff. The contract was entered into with the plaintiff for the benefit of a corporation, not then, but subsequently, established; and the withdrawal of the plaintiff's opposition, which was part of the contract, enabled them to obtain their Act of incorporation. Since the Act has been obtained, however, nothing has been done, nor any step taken to construct the Railway. There is no distinct evidence, indeed, that the Railway has been abandoned; but no money has been paid, no land taken, nor any movement made towards carrying on the scheme, and the powers of the Company given by their Act to take land compulsorily have now ceased.

Under these circumstances, I cannot say that the Company have adopted the agreement, or are bound by its terms; and, therefore, I do not think that I can compel them to admit the contract in an action at law.

I must dismiss the bill, but without costs.

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BEFORE VICE-CHANCELLOR SIR J. PARKER.

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28th, & 31st.*WINCH *v.* THE BIRKENHEAD, LANCASHIRE, AND CHESHIRE
JUNCTION and Other RAILWAY COMPANIES.

An agreement between two Railway Companies, involving a delegation or transfer from one to the other, of any of the duties or powers exclusively given to either of them, is invalid and against public policy.

The 87th section of the Railways Clauses Consolidation Act gives a limited power to a Railway Company to run over a line belonging to another Company, for the purposes of their own traffic only.

An agreement to apply to Parliament, or an agreement not to be acted on until necessary powers have been obtained, is legal, and one with the execution of which the Court will not interfere.

An application to restrain the Company from affixing their seal to an illegal agreement, refused.

Where the object is to restrain the execution of an illegal agreement, a bill filed by one shareholder on behalf of himself and all other shareholders against the Company, is rightly framed, and the officers of the Company need not be individually parties.

THE bill in this case was filed on the 20th of May, 1825, by Henry Winch, a registered shareholder in the capital of the Birkenhead, Lancashire, and Cheshire Junction Railway Company (hereinafter called "the Birkenhead Railway Company"), on behalf of himself and all other shareholders in the capital of the said Company, against the said Birkenhead Railway Company, and against the London and North Western, the Great Western, the Shrewsbury and Birmingham, and the Shrewsbury and Chester Railway Companies; and prayed that the Birkenhead Railway Company, their directors, &c., might be restrained by injunction from putting their seal to or otherwise executing or causing or permitting the execution of an agreement, comprising the terms of certain heads of a proposed agreement (hereinafter set out), or any material parts of such terms, and from acting on the footing of or in accordance with the said proposed agreement, and from making over or transferring to the London and North Western Railway Company their lines of railway, plant, or property, or any part or parts thereof, or the working, management, or control of the said lines of railway, or any part or parts thereof, upon the footing of the said proposed or any other agreement, or otherwise howsoever; and that the London and North Western Railway Company might be restrained by injunction from taking

possession of the lines of railway, plant, and property, or any part or parts thereof, and from working or managing or exercising any control over the lines of railway, or any part or parts thereof, upon the footing of the proposed or any other agreement.

The defendants, the London and North Western Railway Company, demurred to this bill on four grounds:— 1st., want of equity; 2ndly, that the plaintiff and the several persons on whose behalf he sued, had not a common interest in the subject-matter of the suit; 3rdly, that the directors of the Birkenhead Railway Company, or the majority of them, had not been made parties to the suit; and 4thly, that none of the shareholders of that Company, who were desirous that the acts sought to be restrained should be done, were made parties to the suit.

The plaintiff, on the day of filing his bill, moved for an interim injunction in the terms of the prayer of the bill; and his Honour was pleased to make an order, to extend over the 24th of May. The facts as stated on the bill and by affidavit were as follow:—

On the 15th of October, 1851, a memorandum of agreement of that date was entered into between the Great Western Railway Company, the Shrewsbury and Birmingham Railway Company, and the Shrewsbury and Chester Railway Company of the one part, and the Birkenhead Railway Company of the other part, which was in the following form:—"The associated Companies are to have the right of conveying any traffic over the Birkenhead Railway until an Act shall be obtained for the purpose of authorising a lease of that Railway to the associated Companies, provided such Act can be obtained after two bonâ fide applications to Parliament in the years 1852 and 1853; the associated Companies paying, in respect of the traffic which shall pass over any part of either of the lines of the associated Companies to or from the Birkenhead Railway,

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60*l.* per cent. of the sum which may be actually received from the rates which they shall fix and charge for the conveyance of such traffic over the last-mentioned Railway: Provided always, that, for the traffic which may pass to or from places north of Shrewsbury only, the 60*l.* per cent. shall be allowed and paid on the rates which may be fixed by the Birkenhead Railway Company, but not exceeding the rates at present agreed between the Company and the Shrewsbury and Chester Railway Company; and in respect of any local traffic arising upon the Birkenhead line carried by the associated Companies, but not passing over any portion of the lines, 75*l.* per cent. of the receipts and payments for the conveyance of it, the Birkenhead local rates being charged for such last-mentioned traffic. The Birkenhead Railway Company are to give the associated Companies all the rights, conveniences, and accommodations of their line, stations, offices, sidings, sheds, warehouses, and watering-places, &c., and are to incur every charge or expense incidental to the use of them, and to the rights of passing over the railway, excepting only the use of locomotive power, carriages, waggons, or moveable stock, which are to be provided and employed by the associated Companies for the conveyance of such traffic as they may bring or convey, and for which latter service the difference between the 60*l.* per cent. or 75*l.* per cent. (as the case may be), and the full receipt, is to be deemed to be the remuneration. If the Birkenhead Company shall be required to perform any terminal duties in respect of any traffic, they are to be separately paid for to the Birkenhead Company, at a reasonable rate to be fixed. As soon as the said Act shall be obtained, a lease of the Birkenhead Railway shall be completed, and all their property and plant, whether fixed or moveable, (excepting only some surplus land and buildings shewn on a plan to be annexed hereto), are to be transferred to the associated Companies; and this agreement shall be held (subject to the

of July, 1852, and to continue payable half-yearly
the 30th of June, 1854, after which latter period 3½
per cent. on the same capital is to become in like man-
ner payable for one year, viz. to the 30th of June, 1855,
afterwards 4½ per cent. per annum in perpetuity on
the same capital. The Birkenhead Company are to have
power, at any time after the amalgamation of the
Companies, and before the 1st of January, 1856, to
amalgamate at par their fixed capital of 2,000,000*l.* sterling
the amalgamated capital of the three Companies, the
to be in substitution for and in lieu of the fixed rent
forth payable or referred to in this agreement, they
giving six months' notice of such wish to amalgamate,
provided the Act of Parliament shall have conferred
them such power of amalgamation. An Act of Par-
liament to authorise the said lease and amalgamation is to
be introduced in the ensuing session 1852, and again, in
case of need, in the subsequent session 1853; and every
thing is to be made bonâ fide by all the Companies,
and hereto, to carry the said Act, and obtain all requi-
sited powers and authorities for the same object. Neither
any shall directly or indirectly make any arrange-
ment or agreements to do any act which shall interfere
with or prejudice, or be inconsistent with the rights or
interests which are the subject-matter of this agreement,
in the future lease and possession of the Birkenhead

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ers of arbitration shall be contained to settle and determine all matters which may be in difference between the several Companies parties to this agreement. The Birkenhead Company agree to communicate to the associated Companies, and to assign, as far as they have power to do so, all rights, privileges, and benefits enjoyed by them in virtue of any existing agreements with other Companies or parties.

“Paddington Station, Oct. 15, 1851.

“Approved on behalf of the Great Western Railway Company—THOMAS WILLIAMS, CHARLES A. SAUNDERS
 Approved on behalf of the Shrewsbury and Chester Railway Company—ROBERT ROY. Approved on behalf of the Shrewsbury and Birmingham Railway Company—JOSEPH WALKER. Approved on behalf of the Birkenhead, Lancashire, and Cheshire Junction Railway Company—JAMES BANCROFT, WILLIAM GIBB, JAMES BROWN.”

No formal articles were drawn up pursuant to the said memorandum of agreement. And on the 1st of November, 1851, a meeting of the shareholders of the Birkenhead Railway Company was held; and at such meeting the said memorandum of agreement of the 15th of October, 1851, was submitted in the ordinary way to the shareholders, who, with reference thereto, passed two resolutions, which, so far as material, were as follow:—“Resolved, that the memorandum of agreement with the Great Western and Shrewsbury Companies, dated the 15th of October, 1851, be confirmed and ratified.” “Resolved, that the directors of the Birkenhead Railway Company be specially empowered to ratify and confirm, by affixing the common seal of the Company to, any extension of the agreement with the Great Western and Shrewsbury Companies, in like manner as if such extended agreement had been submitted to a meeting of proprietors of this Company.”

Notices for a bill, to be submitted to Parliament, were afterwards issued; and the usual petition for leave to introduce the bill was duly sealed with the corporate seals of the four Companies; and the bill itself was prepared and printed, and deposited, the head and title being—
 “A Bill for the lease of the undertaking of the Birkenhead, Lancashire, and Cheshire Junction Railway Company to the Great Western, the Shrewsbury and Birmingham, and the Shrewsbury and Chester Railway Companies, or to the Great Western Railway Company and either of the said last-mentioned Companies; and for the amalgamation, in a certain event, of the said undertaking with the undertakings of the said three last-mentioned Companies; and for other purposes.”

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The bill was before a committee of the House of Commons for consideration, when, owing to a difference between the Birkenhead Company and the three other Companies, a resolution of a meeting of shareholders of the Birkenhead Railway Company was passed, purporting to require their directors not to proceed with the bill, so far as that Company was concerned. The bill, however, was not withdrawn; and the bill stated that all the Companies, parties to the agreement, except the Birkenhead Company, were ready and willing to act upon it, and to press the passing of the bill; and that the only difference between the Companies was, whether the bill for a lease of the Birkenhead line should be passed before Parliament sanctioned an amalgamation of the other three Companies; and that all the Companies had expended monies in promoting the bill in Parliament.

An advertisement was issued at the end of April, 1852, by the Birkenhead Company, giving notice that a special general meeting of the shareholders of that Company would be held in Birkenhead on the 18th of May, for the purpose of considering and approving, or otherwise, of a certain bill

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then before Parliament, intituled "A Bill to consolidate into one Act, and to amend the provisions of the several Acts relating to the Birkenhead, Lancashire, and Cheshire Junction Railway Company, to authorise the construction of new works, to define the undertaking of the Company, and for other purposes; and also for the purpose of considering and approving, or otherwise, of an agreement for the working of the railways of the Birkenhead Company by the London and North Western Railway Company, and for other purposes."

A meeting of the shareholders of the Birkenhead Company was held on the 18th of May, 1852, and adjourned to the 21st of May. The following were the heads of the agreement referred to in the advertisement:—"Heads of a proposed agreement between the Birkenhead, Lancashire and Cheshire Junction Railway Company and the London and North Western Railway Company:—The London and North Western Railway Company, for a term of ninety-nine years, to work the lines of the Birkenhead Company, using the property and plant of the latter Company, except the lands and buildings specified in the first schedule. The London and North Western Railway Company to run as many trains as the traffic of the Birkenhead Company shall from time to time require, not fewer than are at present, at fares and rates to be fixed by the Birkenhead Company; it being understood, that, for through traffic, the fares and rates shall be the same as those charged by the London and North Western Company to and from the same places. The sum to be allowed the London and North Western Company for working expenses, including passenger duty, maintenance and depreciation of way, works, and plant, and general charges, to be such proportion of the gross receipts as similar expenses of the whole railways of the London and North Western Railway bore to the gross receipts on such railways the preceding half-year; a propor-

s as if it included) the traffic, if any, carried by the
on and North Western Company to and from Shrews-
and places west, north, and north-west of Shrews-
(including the traffic passing over the Holyhead
ay, or any railway or branch railways now or here-
belonging to or connected therewith), to and from
hester, to and from Shrewsbury and the places afore-
and Liverpool and Birkenhead, (which two latter
s, for the purposes of this clause, are to be considered
ical), and to and from Shrewsbury and the places
said, and the several railways uniting with the lines
lway of the London and North Western Company at
pool and Manchester, or any intermediate places be-
a Liverpool and Manchester. The property and plant
e Birkenhead Company to be valued and restored at
ermination of the agreement, of the same working
s. The line between Chester and Birkenhead to be
into an efficient state of repair by the Birkenhead
pany. Provisions for accurate returns of traffic and
ction of books and accounts. Existing traffic not to
duced. Applications to Parliament, if needful; ap-
ment of joint committee, but not to possess or exer-
powers inconsistent with the Acts of Parliament of
respective Companies. Nothing in proposed agree-
; to affect the existing agreements, but same only to
suspended during the existence of the proposed agree-

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of Parliament, passed in the session of 1851. The usual provisions for referring differences to arbitration."

By the statements in the bill, which were supported by affidavit and not denied, it appeared that the majority of the directors of the Birkenhead Railway Company were prepared to authorise the sealing of the proposed agreement, and that they had the seal of the last-mentioned Company in their power and under their control, and that the plaintiff could not obtain the possession thereof, or institute the present suit in the name of, or by the authority of, the last-mentioned Company; that the proposed agreement was illegal, and a fraud on the agreement of the 15th of October, 1851, and beyond the powers of the Birkenhead Railway Company on the one hand, as well as of the London and North Western Railway Company on the other; and that the effect thereof would be, and was, to place the lines of the Birkenhead Railway Company, and the property and plant thereof, completely in the hands and under the control of the London and North Western Railway Company for ninety-nine years, and to transform the Birkenhead Railway Company into an undertaking materially at variance with that in which the plaintiff and the other shareholders became interested as shareholders. That the Birkenhead Railway Company, unless restrained, would make over their lines, property, and plant to the London and North Western Railway Company, upon the footing of the said proposed agreement, although they had no authority so to do; and if they did so, the agreement could not be enforced against, and might at any time be repudiated by, the London and North Western Railway Company; and that great loss would thereby ensue to the Birkenhead Company. That the lines of the London and North Western Railway Company competed with the lines of the four other Companies; and that the main object of the London and North Western Railway

it would be utterly impossible to make them an part of that or any suit; that each of the defendants alleged that the others of them were necessary parties to the present suit. And the bill charged, and the charges were supported by affidavit, that the London and North West-railway Company claimed to have and had an interest in the matters in question therein; and that they, acting in collusion with the said Birkenhead Railway Company, and relying upon the proposed agreement, threatened intended to possess themselves of the lines of the Birkenhead Railway Company, and of the plant and property thereof, which it was intended to hand over to them on the 1st or 22nd of that month, in pursuance of the then agreement, which would be submitted to the meeting on the 1st, and executed, unless the Court interfered, as was hereby sought.

That those who had the management of the said Birkenhead, Lancashire, and Cheshire Junction Railway Company had prepared and threatened to carry out the agreement; and that they alleged that they had been or would be authorised to do so by some vote of the majority of the shareholders of the Company; whereas any such vote was wholly beyond the powers of any number of the shareholders thereof, and no majority of the shareholders thereof could give lawful authority for the execution and carrying out of the terms of the proposed agreement.

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The demurrer now came on to be heard.

Mr. *Bacon*, Mr. *Follett*, and Mr. *J. V. Prior*, in support of the demurrer, contended, that the agreement amounted to nothing more than a contract for working the line and carrying the goods of the Company, which was by no means unusual with Railway Companies. That the agreement did not necessarily take the control or the manner of working out of the hands of the Birkenhead Company. That the present differed from the case of *Beman v. Rufford* (a), for, in that case, the London and North Western Railway Company were not only to have the working, but it was stipulated that they should have the perfect control and exercise all the rights of the Oxford Railway Company. That the contracting parties were, by the terms of the present contract, prevented from exercising powers inconsistent with their Acts of Parliament; and if they wished further powers, it was provided that application should be made to Parliament for them. That the alleged inability to compel the London and North Western Railway Company to undertake their part of the agreement, could not be considered as an element of discussion in the present instance. That it was to be presumed that they already had, or were bound to acquire, all the necessary powers to fulfil their engagements; and that the plaintiff, having no interest in the London and North Western Railway Company, could not now be heard to impugn the validity of the agreement, on the ground that they were not able to perform it. That the frame of the bill, in making the plaintiff represent the assenting as well as the dissenting shareholders, was wrong in principle. That the assenting shareholders were thereby precluded from being heard in support of or stating the grounds of their acquiescence in the agreement:

(a) Ante, p. 48.

Mozley v. Alston (a), *Foss v. Harbottle* (b), *Lord v. The Copper Miners Company* (c). That the directors of the Company ought to have been made parties, a particular charge having been made against them by the statements in the bill, as to their having the seal of the Company in their possession, and being about to affix it to the agreement. That this charge involved an individual delinquency, in respect of which each director was answerable and was to be restrained. That the London and North Western Railway Company were unnecessary parties to the suit; and that, in this respect too, the frame of the bill was wrong. That no relief was sought against them: *The Shrewsbury and Chester Railway Company v. The Shrewsbury and Birmingham Railway Company* (d). That the contract was in fact nothing more than a matter of internal management and convenience, with which the Court would not interfere.

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Mr. Rolt, Mr. Elmsley, and Mr. Giffard, in support of the bill, contended, that the agreement was illegal, and beyond the powers of the Birkenhead or the North Western Railway Company to perform; and that no sanction of the shareholders could render it valid. That the frame of the bill, making one shareholder sue on behalf of all, was perfectly in accordance with the spirit of the decisions, which allowed one dissentient shareholder, even alone, to file a bill to restrain an illegal act on the part of the Company. That the present contract could not be distinguished from that in *Beman v. Rufford* (e). That the arrangement, if carried out, necessarily involved the management of the trains, times, and signals, all of which were, by the Act,

(a) Ante, Vol. 4, p. 636.

(b) 2 Hare, 461.

(c) 2 Ph. 740.

(d) 1 Sim., N. S., 410. This

case will shortly appear in these Reports.

(e) Ante, p. 48.

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placed under the control and superintendence of the directors of the Birkenhead Railway Company. That, by the agreement, all the plant was to be handed over to the London and North Western Railway Company, which not only precluded the Birkenhead Company from fulfilling the duties of their own railway, but from complying with the terms of the 87th section of the General Act with reference to other Companies. That the directors in fact represented the Company, and that it was unnecessary to make them individually defendants.—The following cases were also cited: *Bagshawe v. The Eastern Union Railway Company* (a), *Bromley v. Smith* (b), *Preston v. The Grange Collier Dock Company* (c), *Colman v. The Eastern Counties Railway Company* (d), *Ward v. The Society of Attorneys* (e), *Adley v. The Whitstable Company* (f).

Mr. *Follett* replied.

[His Honour then expressed a wish, before giving judgment on the demurrer, to hear the motion for an injunction argued.]

Mr. *Rolt*, Mr. *Elmsley*, and Mr. *Giffard*, in support of the motion, relied on the illegality of the agreement, and cited *The Scottish Central Railway Company v. The London and North Western Railway Company* (g).

Mr. *Bethell* and Mr. *G. L. Russell*, on behalf of the Great Western Railway Company, supported the views of the plaintiff; and contended that the agreement with the London and North Western Railway Company was a fraud upon the agreement entered into with them in October, 1851.

(a) Ante, Vol. 6, p. 152.

(b) 1 Sim. 8.

(c) 11 Sim. 327.

(d) Ante, Vol. 4, p. 513.

(e) 1 Coll. 370.

(f) 19 Ves. 304.

(g) Not yet reported.

Mr. *Daniel* and Mr. *Schwyn* for the Birkenhead Railway Company, contended, that the bill was an attempt improperly to interfere with the internal arrangement of a Railway Company. That every thing to be done under the agreement was to be subject to the sanction of Parliament; and that nothing having yet been done to legalise the agreement, the bill was in itself premature.—The following cases were cited: *The Great Western Railway Company v. The Birmingham and Oxford Junction Railway Company* (a), *Ware v. The Grand Junction Waterworks Company* (b), *Hodgson v. Earl Powis* (c), *Cohen v. Wilkinson* (d), *Stevens v. The South Devon Railway Company* (e), *The Great Northern Railway Company v. The Eastern Counties Railway Company* (f), and *Haines v. Taylor* (g).

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The VICE-CHANCELLOR, in the course of the argument, asked the counsel for the Birkenhead Railway Company whether they would undertake not to hand over their property and plant without the sanction of Parliament. But Mr. *Daniel* declined to give the undertaking, submitting, that, if the Company were to do so, they would thereby admit the necessity or propriety of the filing of the bill.

Mr. *Bacon*, Mr. *Follett*, and Mr. *J. V. Prior*, appeared for the London and North Western Railway Company.

Mr. *Rolt* was commencing his reply, when the Vice-Chancellor said, that he could relieve him from some part of it; for that, with respect to the agreement, not referring however to that part of it which provided for an application to Parliament—he was clearly of opinion that it was

(a) 2 Ph. 597.

(b) 2 Russ. & M. 470.

(c) 1 De G., Mac, & G., 6.

(d) Ante, Vol. 5, p. 741.

(e) 13 Beav. 48.

(f) 9 Hare, 306.

(g) 2 Ph. 209.

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not at present within the powers of either of the Companies. Parliament could give them powers; but as the matter then stood, he thought that they could not perform the agreement with their present statutory powers.

The VICE-CHANCELLOR—(after some discussion as to the form of the injunction asked, proceeded as follows:—

Here is an agreement, the object of which is, that the London and North Western Railway Company, for a term of ninety-nine years, may work the line of the Birkenhead Company, using the property and plant of the latter Company, except the land and buildings specified in the first schedule; and the property and plant of the Birkenhead Company is to be valued and restored at the termination of the agreement, of the same working value. Now, as to the undertaking to work the line, as it appears to me, it is quite plain that the London and North Western Railway Company at least undertake all that part of the business of this Company which is carried on upon the line of the Railway. The agreement expresses that they are to run the trains, and refers to the working expenses—pointing out, therefore, that what is meant by working is, the maintenance of the way, and making good the depreciation of the way, of the works, and of the plant. The Company who work the other Railway are to have the use of the property and plant of the other, and that must mean the exclusive use as between themselves and the Birkenhead Railway Company; because it is clear, that, if the London and North Western Railway Company are to work it under this agreement, the Birkenhead Company cannot work it, and they must part with the use of their property and plant, with the exception of some land and buildings, for the purpose of working it, to the other Railway Company. Now, I think that it is impossible that that can be carried out without delegation or transfer to the London and North Western Railway Com-

ny of some, at least, of the duties and powers which are ven exclusively to the Birkenhead Company by their ts of Parliament. It appears to me, that although e Birkenhead Company are not at all bound to be car- rs, that what is called working the line is a duty that imposed by Act of Parliament upon them; and there- re, that the agreement is, that they shall part with cer- in statutory powers, which they have no authority to rt with; and, moreover, that they are to part with them a body, who, by their constitution, cannot accept them; r the London and North Western Railway Company, as understand its constitution and objects, cannot, without rther authority from Parliament, undertake the working another line of railway.

It was contended, that, if that had been a ques- on of simple invalidity of the agreement, as regards e London and North Western Company, merely resolv- g itself into this, that the agreement is not mutual, was for the Birkenhead Company to consider whe- er they would or not enter into an agreement which ight go on for a certain time, but which could not be en- rced. It seems to me, that it is not a question of simple capacity on the part of the London and North Western ailway Company to undertake the working of this line, it that it is against the policy of these Acts of Parlia- ent; and I think, therefore, that the agreement for mak- g over this property to them is an agreement savouring : illegality, which any shareholder in the Birkenhead ompany has a right to come to the Court to restrain.

I think it is impossible to say that the working of the line r the London and North Western Railway Company can : authorised by the 87th section of the Railways Clauses onsolidation Act, which merely gives them a limited iver to run a portion of their traffic, where it is neces- ry for the purposes of their own traffic, over the other ne; and I cannot distinguish an agreement of this kind

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from an agreement for a lease. It is true that a lease is not mentioned; but this agreement seems to me to have all the attributes and consequences of a lease, and it is not contended that a lease is within the powers conferred by these Acts of Parliament; so that further statutory powers are necessary either to enable the one Company to part with, or to enable the other Company to accept, the powers which it is proposed by this agreement to give over to them. Now, the agreement itself seems to contemplate this, for it says that there is to be an application to Parliament, if needful. There is to be an appointment of a joint committee, but not to possess or exercise powers inconsistent with the Acts of Parliament of the respective Companies. If the agreement were for an application to Parliament for the necessary powers, or if it were an agreement not to be acted upon until the necessary powers have been obtained, it appears to me that it would be an innocent and a lawful agreement, and one with the execution of which the Court would not interfere.

It appears to me, not only on the allegations of this bill, but on the uncontradicted affidavits on which the Court proceeds upon a motion of this kind, that there was an intention that this agreement should be acted upon without the authority of Parliament, and before the authority of Parliament should be obtained, if the shareholders agreed to it; and the statement in the bill is, that they were about to agree to it; and that, at a meeting which was about to be held, there was no doubt that the shareholders would agree to it; and that it was immediately to be acted upon, by handing over the property and plant of the Birkenhead Company to the other Company. I cannot doubt, that, if this bill had not been filed, that would have taken place on the 21st or 22nd of this month. It is stated that there was the intention to do it, and that statement is not contradicted on the affidavits. Now, it is very true, that, after an interim order had been made, the

consideration of this matter was adjourned; but still I do not find anything in the affidavits disclaiming on the part of either Company the intention of acting on this agreement, the sanction of their shareholders should be obtained, without waiting for the further sanction of Parliament, which it appears to me to be indispensable they should have.

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Something has been said about the frame of the bill. I think that this bill is correctly framed by one on behalf of himself and all the other shareholders. It is not necessary to refer to any authority further than the very forcible language of Lord *Cranworth* in that case of *Beman v. Rufford*, in which he said that any one shareholder may come on behalf of all, to prevent what he calls an infringement of the law of the concern. I do not think it is necessary that the directors should be made parties. The act that is sought to be restrained is the act of the Company. It is quite sufficient if there is an order to restrain the Company; the Company itself cannot act except by means of its officers. It appears to me that the suit is properly framed by the relief being sought against the Company alone.

A good deal has been said about the former agreement between the other associated Companies. That agreement is not in the same terms as this by any means; and quite different observations are applicable to it. There is no attempt here to conceal the interest which the Great Western Railway Company have in that other agreement. They are brought before the Court to argue for that interest. I can see nothing in all that has taken place there to prevent Mr. Winch, who is a shareholder in this Company, from coming and seeking to restrain an infringement of the constitution of this Company as it is established by law.

I do not, however, think it is necessary to grant an injunction to restrain them from putting their seal to it—that part will take care of itself. If any agreement beyond

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their powers is executed, it will be time enough to come then and ask the Court, on that additional fact, to act; but seeing that, upon this evidence, there was an intention, not disputed or contradicted, to act on this agreement upon obtaining the sanction of a meeting of shareholders, without going to Parliament, I think the plaintiff is entitled to an injunction in the terms of his notice of motion, to restrain the Birkenhead Company from making over to the London and North Western Railway Company the Birkenhead Company's lines of railway, plant, or property, or any part or parts thereof, on the footing of the agreement; and that the London and North Western Railway Company may in like manner be restrained from taking possession of the said lines of railway, plant, or property, or any part or parts thereof, on the footing of the agreement. And I overrule the demurrer.

[His Honour refused to express any opinion on the legality of the other agreement with the Great Western Railway Company.]

The order for the injunction was drawn up in the following form:—Ordered, that an injunction be awarded to restrain the defendants, the Birkenhead Railway Company, their directors, officers, and agents, from making over or transferring to the London and North Western Railway Company the said Birkenhead Railway Company's lines of railway, plant, and property, or any part or parts thereof, or the working, management, or control of the said lines of railway, or any part or parts thereof [until answer or other order (a)].

(a) See next case.

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BEFORE VICE-CHANCELLOR SIR G. J. TURNER.

MPSON v. DENISON and Others, THE GREAT NORTHERN RAILWAY COMPANY, and THE AMBERGATE, NOTTINGHAM & BOSTON, AND EASTERN JUNCTION RAILWAY COMPANY.

*June 12th,
13th, & 24th.*

HIS was a motion for an injunction to restrain the defendants, the chairman and directors of the Great Northern Railway Company, and that Company (also defendants to the bill), from working the traffic of the Ambergate, Nottingham and Boston, and Eastern Junction Railway Company (hereinafter called the Ambergate Company). And so from applying any of the funds or monies of the Great Northern Railway Company in or towards paying or answering the liabilities of the Ambergate Company in respect of the Grantham and Nottingham Canals, or any other liabilities of the said Company, or in indemnifying the same company against all or any of their liabilities, whether of canals or otherwise, or in or towards paying to the same company such sum as would, after answering all expenses and liabilities, furnish a dividend of 4l. per cent. on the paid-up share capital of the same Company, or in paying under or in pursuance of the agreement of the 5th

One Railway Company entered into the following agreement with another Railway Company:—
“The Great Northern Railway Company to give the following terms, bearing harmless the Ambergate Railway Company against all liabilities, whether of canals or otherwise. The Great Northern Railway Company, until an Act of Parliament can be obtained, to work the traffic of the Ambergate Railway Company

on the 1st of July next, and to pay to the Ambergate Railway Company such toll as will, after answering all expenses and liabilities, furnish a dividend of 4l. per cent. on the paid-up share capital of the Ambergate Railway Company; and, as soon as an Act of Parliament can be obtained, will guarantee a dividend of 4l. per cent. on such capital. The Great Northern Railway Company to apply, at their own expense, for an Act of Parliament to ratify such arrangement; and, in case such Act is not obtained in the first session, the application to be renewed, always at the expense of the Great Northern Railway Company, unless the same be lost by the default of the Ambergate Railway Company. The Great Northern Railway Company to have the privilege of paying off the shareholders in full, on giving six months' notice at any time after the obtaining of the Act. No further call to be made on the Ambergate shares.”

This agreement had been approved at a general meeting of one of the Companies, but, before it was submitted to the meeting of the Great Northern Railway Company, one of the shareholders filed a bill praying an injunction to restrain the Company from proceeding with it:—*Held*, that the 87th section of the Lands Clauses Consolidation Act gives one Railway Company a right to contract for passing over the line of another Company, and to stop, and take up and carry passengers and goods on that line, but not to acquire the trade of the Company over whose line they have agreed to pass.

That an agreement “to pay such an amount as would, after answering all expenses and liabilities, furnish a dividend of 4l. per cent.,” is not an agreement to pay “toll” within the meaning of the Act.

That, if one shareholder dissent, the funds of a Company are not applicable to the purpose of applying to Parliament for powers to enter into any undertaking not forming part of the original objects for which the Company was incorporated.

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of May, 1852, (hereinafter mentioned) or the arrangement intended to be thereby made, or any similar arrangement, contained or to be contained in any deed that then was or might thereafter be prepared to carry out such arrangement, with or without any variations, additions, or modifications consistent with the scope of such arrangement, and also from pledging the credit of the Great Northern Railway Company for all or any of the above purposes.

The bill in this case was filed on the 28th of May, 1852, by J. Simpson and W. Wright, on behalf of themselves and all other the proprietors of stock and stockholders in the Great Northern Railway Company, except such of them as were defendants thereto, and stated, that the plaintiff Simpson was, long previously to the 5th of May, 1852, the registered proprietor of twenty 25*l.* shares in the capital of the Great Northern Railway, converted into 500*l.* stock of that Company, and that the plaintiff Wright was the registered proprietor of fifty half shares in the said capital, converted into 625*l.* consolidated stock of the Company. The bill then stated the Acts of Parliament establishing the Great Northern Railway Company, with which the then General Consolidation Acts were incorporated, and also the Act of Parliament establishing the Ambergate Company; and that, by the last-mentioned Act, it was among other things enacted, that, from and immediately after the opening of the Ambergate Railway, the Company thereby incorporated should be liable to pay to the committee of management of the Nottingham Canal the sum of 225*l.* for each share in that Canal (500 in number) and to the committee of management of the Grantham Canal 160*l.* for each share (750 in number) within six calendar months from the opening of the Railway, but without interest in the meantime; and that the said sum, if not paid within the period and in manner before stated, should be recoverable, with interest at 5*l.* per cent. per annum: and by the 81st section of the said Act, provision

as fully &c., as by the Canal Companies.

bill then stated, that a judgment had been given in
of the Grantham Canal Company against the Am-
Company for the sum of 120,000*l.* and costs, which
not been paid; and that 112,500*l.*, with interest, was
due from that Company to the Nottingham Canal
any. That the directors of the Great Northern Rail-
Company had then recently determined to possess
elves of the entire control, and work the whole traffic
Ambergate Railway, and had come to an agree-
dated the 5th of May, 1852, signed by the defend-
the chairman and one of the directors of the Great
ern Railway Company, on behalf of that Company,
y the chairman, deputy chairman, and one of the di-
s of the Ambergate Company; which agreement was
ows: "The Great Northern Railway Company to give
llowing terms, bearing harmless the Ambergate Rail-
Company against all liabilities, whether of canals or
wise. The Great Northern Railway Company, until
t of Parliament can be obtained, to work the traffic
Ambergate Railway Company from the 1st of July
and to pay to the Ambergate Railway Company such
s will, after answering all expenses and liabilities,
h a dividend of 4*l.* per cent. on the paid-up share
l of the Ambergate Railway Company; and, as soon
Act of Parliament can be obtained, will guarantee

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application to be renewed, always at the expense of the Great Northern Railway Company, unless the same be lost by the default of the Ambergate Company; the Great Northern Railway Company to have the privilege of paying off the shareholders at par, on giving six months' notice at any time after the obtaining the Act. No further call to be made on the Ambergate shares."

That the agreement had been confirmed at a special general meeting of the Ambergate Company, and that the Boards of Directors of the two Companies were about to cause the terms of the agreement to be embodied in a deed, and to affix their respective common seals thereto.

The bill prayed, that the agreement of the 5th of May, 1852, might be declared illegal and void, and an injunction in the terms of the present motion.

The affidavits filed on behalf of the defendants, the Great Northern Railway Company, stated that, according to the best of the deponents' judgment and belief, the sum which would be requisite to be paid by the Great Northern Railway Company, in order to make up a dividend of 4l. per cent. upon the capital of the Ambergate Company, beyond the profits of the same Company, exclusive of the Great Northern trains, would not exceed but rather be less in amount than the maximum tolls which were payable under the Acts of Parliament of the Ambergate Company, in respect of the several articles of traffic which would be carried by the Great Northern trains over the line of the Ambergate Company. That the Great Northern Railway Company did not intend to take the whole control over, and the working of, the whole traffic of the Ambergate line, but that they did intend to work the trains of the Great Northern Railway over the line of the Ambergate Railway, in conformity with such rules and regulations as had been or should be laid down or established by that Company; and to carry, by means of the same trains, as well the traffic of the Great Northern Railway

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guarantees to two Canal Companies, and to perform contracts which were never included in the Railway and works which they were authorised to make by their original Act. That the Great Northern Railway Company could not apply their funds to any such purposes: *Colman v. The Eastern Counties Railway Company* (a), *Attorney-General v. The Corporation of Norwich* (b), *Attorney-General v. The Guardians of the Poor of Southampton* (c). That the present agreement, if permitted to be acted on, would not only be against public policy, but would work a private injury on the shareholders: *Attorney-General v. Andrews* (d); and that an individual shareholder could file his bill for an injunction to restrain the majority from acting under it.

Mr. Bethell, Mr. Rolt, and Mr. E. B. Denison, for the Great Northern Railway Company, contended, that the agreement was to have partly an immediate and partly a future effect. That that part of the contract which came within the legitimate powers of the Company would be immediately undertaken; but that that part which required the sanction of the legislature would only come into operation when the necessary powers, for which the Company were about to apply to Parliament, had been obtained. That the Great Northern Railway Company intended to use their own rolling stock, and to carry their own passengers and traffic; that by "working the traffic of the Ambergate Company" was meant the carrying passengers and traffic in their own carriages along the line; which did not prevent other Companies from working it also, or interfere with the direction and control of the times of starting and other duties of the directors of the Ambergate Company. That the agreement was a matter of private arrangement between the two Companies as to

(a) Ante, Vol. 4, p. 513.

(b) 16 Sim. 225.

(c) 17 Sim. 7.

(d) 2 H. & T. 431.

the best mode of carrying out the objects of the Company, and the convenience and conveyance of their own passengers. That there was no allegation in the bill that the objects of the agreement would be prejudicial to the Great Northern Railway Company; on the contrary, the affidavits shewed that it would be very advantageous. That, in such a case, the Court would not interfere: *The Great Western Railway Company v. The Birmingham and Oxford Railway Company* (a), *Stevens v. The South Devon Railway Company* (b), *Mount v. The Shrewsbury Railway Company* (c). That the Great Northern Railway Company were willing to give an undertaking not to do anything but what they were strictly justified in doing, until they had obtained an Act of Parliament; and that, therefore, the injunction would be nugatory. That there was nothing illegal in the amount of money in the nature of a toll to be paid by the Great Northern Railway Company. That the 2nd section of the Railways Clauses Consolidation Act did not limit the toll in cases where the passage over the line was by agreement. That that question applied only to compulsory cases; and that the "toll" to be paid for the user of the Railway would apply not only to the money to be paid for the use of the Railway, but must include the interest on debt incurred in the formation of it. That the payment proposed to be made was a "toll" for the user of the Railway. That the part of the injunction asking the Court to restrain the Company from applying to Parliament could never be granted; for, if such a principle were once admitted, Railway Companies would not be able to amend an error in their Act: *Ware v. The Grand Junction Waterworks Company* (d), or to apply for further powers. That the object of the Company in applying to Parliament was strictly within the scope of the

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(a) 2 Ph. 605.

(b) 13 Beav. 48.

(c) 13 Beav. 1.

(d) 2 Russ. & My. 470.

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views of the Company as incorporated, and was merely an extension or branch line, legitimately springing out of the original scheme. That a part of a contract being invalid did not vitiate the whole; and that, if the Court should consider a part *ultra vires*, it would not on that account extend the injunction over the whole of the agreement, as prayed by the bill, but would restrict it to such parts only as it considered illegal.

Mr. *J. Baily*, Mr. *Erskine*, and Mr. *Hedge*, for the Ambergate Company, were willing to abide by the agreement, and supported the views of the Great Northern Railway Company.

Sir *W. P. Wood*, in reply, contended, that every part of the injunction asked by the notice of motion was strictly confined to acts contemplated by the Company, which were in themselves illegal or unauthorised by the legislature.

The VICE-CHANCELLOR.—The case upon this agreement comes before the Court upon an application for an injunction by some of the shareholders in the Great Northern Railway Company, suing on behalf of themselves and of the other shareholders of the Company, except the defendants; and the injunction which is asked goes to three points—First, to restrain the Great Northern Company from working the traffic of the Ambergate Company. Secondly, to restrain them from applying any of the funds or monies of the Great Northern Company in or towards paying or answering the liabilities of the Ambergate Company in respect of the canals or any other liabilities of that Company, or in indemnifying the Ambergate Company against all or any of their liabilities, whether of canals or otherwise, or in or towards paying the said Company such sum as will, after answering all expenses and liabilities, furnish a dividend

kind of injunction which is asked is, to restrain the Great Northern Railway Company from "applying their funds in applying for or endeavouring to obtain an Act of Parliament to ratify the said agreement or arrangement intended to be thereby made, or any similar arrangement contained or to be contained in any bill which now is or may hereafter be prepared to carry out such arrangement, with or without any variations, additions, or modifications, consistent with the scope of such agreement; and also from pledging the credit of the Great Northern Railway Company for all or any of the purposes."

The first question to be considered upon this motion is, what are the general principles which ought to be applied in cases of this nature? And I take the point to be well settled, that the principles which are to govern cases of partnership between large Companies are the principles which regulate the rights in ordinary partnerships. It is to be considered, therefore, how this case would have been decided if this had been an ordinary limited partnership. As these Companies are formed for special purposes—the special purpose of making railways between particular places, with power to carry passengers and goods between those places; and, in the case of an ordinary partnership formed for such purposes, I take it to be quite clear, that the majority of the partners could by any means bind the

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points, who are empowered to carry on that railway between those points, I take it to be quite clear that no majority of the partners could bind the minority to make the railway between different points, or to extend that railway to different places, and to become carriers between the different places to which the railway might be extended. I would take this case:—Suppose there is a contract between a limited number of persons to trade between particular places—between London and Oporto, in any particular branch of trade—I take it to be quite clear, that, upon a contract limiting the trade between those two places, it would not be competent to any majority of the partners to bind the minority of the partners to trade between London and Lisbon, or between other and different places, though embarking in a trade of the same nature and description. And I will mention a case which was referred to in the argument of horsing coaches, which, as it was said, is rather similar to the present.—Suppose a contract to be entered into between a limited number of persons to horse a coach between London and Bath, I take it to be quite clear that the majority of those persons could not bind the minority to horse that coach between Bath and Exeter. I think, therefore, that the general principle would apply in a case of this description.

If the case, therefore, rested here, I should feel no doubt upon the subject. But, in applying those principles, it is necessary to consider all the terms of the partnership; and the General Act of 8 & 9 Vict. c. 20, s. 87, contains this provision: “It shall be lawful for the Company, from time to time, to enter into any contract with any other Company, being the owners or lessees or in possession of any other railway, for the passage over or along the railway by the special Act authorised to be made of any engines, coaches, waggons, or other carriages of any other Company, or which shall pass over any other line of railway, or for the passage over any other line of railway

or apportionment of the tolls to be taken upon pective railways." Now, that being a general en- applicable to all Railway Companies, I take it, person who becomes a shareholder in a Railway y must be considered as holding, and contracting those shares subject to the provisions of this stand it is to be considered, therefore, what is the that clause.

argued for the plaintiffs that the effect of that , merely to give to one Company a right to compassing over the line of another Company; and annot give to any Company the right to take up y passengers and goods upon the line which is to ssed over. This, I confess, appears to me to be a construction of that clause of the Act of Parlia- The object of the clause is plainly to enable the ?one Company to pass to the limits of the railway er Company, so as to avoid the necessity of chang- trains at the point of terminus of each of several

then, being the object of the clause,—as, for in- to take the present case,—the Great Northern stops at Grantham: that is the point where the ntended to take place. Supposing the railway to Grantham, and another railway to go on from um to York. the object of this clause in the Act

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that case are to pass along the railway, and if the object of the clause be to give them a right to pass along the railway, it must be within the contemplation of the legislature that they might contract for the right to stop at stations on the line over which they are to pass; and they are to have a right to stop as well as to pass, I think it would be exceedingly difficult to say that they are not also to be at liberty to take up passengers and goods at the points at which they are enabled and empowered to stop. I think it cannot be said, that, having the right to stop, they should be restricted and should not be able to contract for the right to take up passengers and goods. I think, that 'passing over,' in the 87th section of the Railways Clauses Act, must be construed to mean passing with the incidents which ordinarily attach to passing over—that is to say, the incidents of stopping and of taking up at the points at which they do stop, both passengers and goods.

But then, it was argued for the defendants, that the right of stopping and taking up passengers and goods was unlimited, and that they might bargain to carry the whole of the traffic of the railway over which they are empowered to agree to pass. I think this argument goes too far also. The right, in my opinion, is a right to agree to pass over any other line of railway with the incidents of passing over; but not a right, under the colour of passing over another line of railway, to acquire the trade of the Company over whose line of railway they are at liberty to enter into an agreement to pass.

The question, therefore, in this case, in the view which I take of it, must be this: whether the agreement between the two Companies is a bonâ fide agreement, entered into for the purpose of passing over another line of railway upon the terms prescribed in the Act; or whether it is an agreement entered into between the Companies for another and a different purpose, as, for the purpose of acquiring

ing the trade of the other Railway Company; and by that test I think the question as to the injunction upon the first two points must be tried in the present case.

Now, looking at the agreement, I entertain no doubt whatever upon it. Its object is, not merely to acquire the right of passing from Grantham to Nottingham, over the line of the Ambergate Company, with the usual incident of passing over, that of taking up and setting down passengers and goods; but it is to acquire the whole traffic of the Ambergate Company. This was clearly meant to be the result when the Act should be obtained; and the agreement draws no distinction between what is to take place before the obtaining of the Act, and what is to take place afterwards: I cannot, therefore, entertain any doubt but that this agreement has not been entered into for the bonâ fide purpose of merely acquiring the right to pass over the Ambergate Railway within the meaning of the 87th section of the Act.

The defendants, however, feeling probably the difficulty of maintaining the case upon the agreement itself, state by their affidavits what it is their intention to do before the passing of the Act; and they state, "that it is the intention of the said Great Northern Railway Company, from the 1st of July next, until an Act of Parliament can be obtained, to work the trains of the said Great Northern Railway Company, which shall pass over the lines of the said Company contiguous to the lines of the said Ambergate Company, over the line of the Ambergate Company, in conformity with such rules and regulations as have been or shall be laid down or established by the said Ambergate Company, and to carry, by means of the same trains, as well the traffic of the said Great Northern Railway, as also such of the traffic of the said Ambergate Company, as can be conveniently conveyed and accommodated by the same trains, leaving the said Ambergate Company in the control over and management

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of their said line, and to work all other traffic on their said line; and that the said Great Northern Railway Company shall pay to the said Ambergate Company, in respect of such passage of the trains of the Great Northern Railway Company over and along their said railway, and in respect of the traffic thereby conveyed, such toll as will, when added to the profits to be derived by the said Ambergate Company from all other traffic and sources, after answering all expenses and annual liabilities, furnish a dividend after the rate of 4*l.* per cent. per annum on the paid-up share capital of the said Ambergate Company."

Now this statement possibly might vary the case, or at least induce the Court to qualify any injunction which it might think proper to grant, if the agreement were, in other respects, within the powers of the Act of Parliament; but, in my opinion, this agreement is not in other respects within the powers of the Act of Parliament. The Act enables the two Companies to agree for the one passing over the line of the other, upon the payment of such tolls and under such conditions and restrictions as may be mutually agreed upon; but, in my opinion, what is agreed to be paid here is not toll, within the meaning of this Act of Parliament. The agreement is, that there shall be a payment of such an amount as will, after answering all expenses and liabilities, furnish a dividend of 4*l.* per cent. on the paid-up share capital of the Ambergate Company.

Tolls, as defined in the dictionaries, are dues receivable for the liberty of passing over highways, public or private; they are payments connected with the passing over; and therefore, I think, to be measured with it. Now, my attention was drawn to the expression "tolls" in the Act; and the great difficulty which existed in determining what was the true meaning of that word in the 87th section of the Act was suggested; and I perfectly agree with the learned counsel, that it is very difficult to say how the

t, I should, as at present advised, say, that what meant by the Act of Parliament was, that the tolls to be fixed with reference to the number of carriages passing over the railway under the terms of the agreement, that the payment is to be for their passing over the railway is clear, both by the expression of the clause, and by the force of the word "toll," which of itself imports a toll for passing over. I do not, however, mean to prejudicate any question whenever it may arise; I have merely brought out that consideration, in order that the parties, if they are under difficulty, may consider whether the Act will not bear that construction.

The result, therefore, of my opinion on the subject is, that the agreement which has been entered into between the two Companies is not within the meaning of the Act of Parliament; that it is not warranted by the Act; and independently of the Act, it could not be a valid agreement: and I am of opinion, therefore, that the injunction is due upon the first two points, qualifying, however, the first part of the injunction by adding the words "or in pursuance of the agreement, or of any arrangement which may be consequent thereon." I have struck out the words "arrangement intended to be made by, or any arrangement to be contained in any deed purporting to carry out that agreement." So that the injunction, when stands, is, to restrain them from working the

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The second part of the injunction does not require qualification; for, according to the view which I take of the case, the Great Northern Railway Company (the defendant) being a toll within the meaning of the Act) can have no right to pay any of the liabilities of the Ambergate Railway Company.

The remaining part of the injunction—the third part—is as to the right of the Great Northern Railway Company to apply their funds in payment of the expenses incurred by an application to Parliament, for the purpose of carrying out this arrangement. Upon this subject a case of *Ware v. The Grand Junction Water Company* (a) was very properly relied upon on the part of the defendants; but, upon carefully reading that case, I do not observe that the distinction between going to Parliament, and applying the funds of the Company for the purpose of going to Parliament, appears to have been made or indeed at all considered. The point does not seem to have attracted Lord Brougham's attention. But the cases have, I think, very clearly established that distinction, which, in my opinion, is perfectly well founded. I will test it by again applying the principle which governs all these cases of a limited partnership. Could one partner be permitted to use the funds of a partnership for an application to Parliament to authorise the extension of the trade beyond the limits prescribed by the articles? I take it to be perfectly clear that he could not. And he could not in the case of a limited partnership, extend that principle to these large partnerships, I am of opinion that all the members cannot, as against one dissenting member, agree that the funds of the Company shall be applied for a purpose not warranted and not provided for by the articles, the articles containing no such provision.

What the effect might be if there were an agree-

(a) 2 Russ. & My. 470.

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between parties for the purpose of carrying on, not a particular trade between particular places, but a general trade—to carry on trade in particular articles, not between particular places, but generally; there, I should be very much disposed to say, that the effect would be, that the majority of the partners, all having agreed to carry on the trade in those articles, the majority could bind the minority as to the places between which that trade was to be carried on; but that, where the partnership specifically provides for carrying on the trade between certain limits, I take it, that no majority could bind the minority to carry it on between different limits; and therefore no majority can bind the minority, or can authorise an application of partnership funds to a purpose not warranted by the partnership articles.

A distinction was attempted, in the present case, between an application to Parliament for the purpose, as it was said, of carrying out the purposes of the partnership, and an application to Parliament for another and different purpose than the purposes of the partnership. But this distinction appeared to me during the argument, and upon further consideration it has appeared to me since, to be founded altogether upon a fallacy; because the purpose for which this partnership was formed, was not for carrying on and making all railways, or carrying goods and passengers upon all railways; but the purpose is for making a particular railway, and carrying goods &c. upon that particular railway. And, therefore, it is so limited that the intended application is necessarily for another and a different purpose. It is, in truth, another and a different purpose from that which is prescribed by the Act of Parliament under which the Company is constituted; which forms, as it were, the partnership deed between these parties.

I am of opinion, therefore, that the injunction is also due upon this point; but I think that it goes too far.

pany, under or in pursuance of the agreement of day of May, 1852, or of any deed or instrument purpose of carrying the same into effect; and also applying any of the funds or monies of the said Northern Railway Company in or towards paying liabilities of the said defendants, the Ambergate &c. Company, in respect of the Grantham and Nott Canals, or any other liabilities of the said last-mentioned Company; or in indemnifying the same Company all or any of their liabilities, whether of canals or otherwise; or in or towards paying to the said Company sum as will, after answering all expenses and liabilities, furnish a dividend of 4l. per cent. on the paid-up capital of the said Company; or in paying, under pursuance of the said agreement or the arrangement intended to be thereby made, any other sum of money ever to the same Company; or in applying for or endeavouring to obtain an Act of Parliament to ratify the agreement or the arrangement intended to be made; and also from pledging the credit of the Northern Railway Company for all or any of the purposes" [until answer or other order].

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COURT OF EXCHEQUER.

Easter Term, 1852.

OWLES v. THE GREAT WESTERN RAILWAY COMPANY.

April 15th.

E.—The declaration stated, that the defendants were proprietors of the Great Western Railway, and carried on business of common carriers thereon; and that the plaintiff caused to be delivered to them as common carriers, and the defendants received, twenty boxes, containing therein magic lanterns, &c., of the plaintiff, to be conveyed by the defendants from Bristol, and to be delivered to the plaintiff at Brompton, county of Middlesex; yet the defendants, not regarding their duty, did not use due and proper care in and the carriage and conveyance of the boxes, and the carriage thereof; but so carelessly conducted themselves, that the boxes and the goods were, through the carelessness and negligence of the defendants, thrown on to the ground, and divers glass goods were broken.

It was stated that the plaintiff did not cause to be delivered to the defendants, nor did the defendants receive, the said goods to be safely and securely carried, and delivered, in due form.

The cause was tried before Lord *Campbell*, C. J., at the

On the delivery of goods by the plaintiff at Bristol to the defendants, he received from them a note, stating that the goods were to be conveyed by the Company as below, and on the conditions stated on the other side. Below was a statement that "Bristol" was the station from which, and "Paddington" the station to which, the goods were to be carried; and that the plaintiff's address was at "Brompton." One of the conditions at the back of the receipt stated, that goods addressed to consignees resident beyond the immediate

of the Company's Goods Stations would be forwarded by public carrier or otherwise, as opportunity offer; but that the delivery of the goods by the Company would be considered as complete, and the responsibility of the Company cease, when such carriers received the goods; and that the Company would not be responsible for loss or damage to goods beyond the limits of their railway. The plaintiff's goods were safely conveyed to the Paddington station, and there given to a specially appointed by the Company for the collection and delivery of goods, and through negligence were damaged on their delivery at Brompton. The defendants' charge included the carriage from Paddington to Brompton:—*Held*, that the contract of the defendants was to carry from Paddington, and that they were not liable for the subsequent damage.

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Bristol Summer Assizes, 1851 ; when it appeared that King, as agent of the plaintiff, took to the Bristol of the Great Western Railway the goods in question by carriage to London, and delivered them to the defendant at the station, who signed a receipt, of which this is a copy:—

“ BRISTOL STATION, May 1851.
“ Great Western Railway.

“ To the Great Western Railway Company.
“ Received the under-mentioned goods from Mr. J. King, Bristol, to be conveyed by the Great Western Railway Company mentioned below, and on the conditions stated on the back of this receipt.

From what Station.	To what Station.	Name and Address.	Description of Goods.	No. or Mark.	W.
Bristol	Paddington	W. H. Fowles . 19, Montpelier Row, Brompton.	{ 1 case, 2 hampers, 1 box, 1 bundle }	. .	—

(Signed) “ JOSEPH KING
“ Received the above-mentioned goods in good order.

Entered by J. 351.

Loaded by A. Beaven on Truck

At the back of the receipt were printed the following conditions:—

“ PUBLIC NOTICE:—

“ That all goods received by the Company within the limits of the local regulations for conveyance on their Railway, whether they be sent and booked without charge for collection ; and that all goods sent to consignees resident within the limits of delivery of the Company’s Goods Station, and respecting which no directions to the contrary shall have been received, will be delivered without additional charge by the Company at those places.

“ That all goods addressed to consignees resident in the immediate vicinity of the Company’s Goods Station, and respecting which no directions to the contrary shall have been received, will be forwarded to the consignee by public carrier or otherwise, as opportunity may

will, at the discretion of the Company by whom they have been received, be suffered to remain on the Company's premises, or be placed in shed or warehouse, if there be convenience for receiving the same, pending communication with the consignees, at the risk of the owners. But that the charges of such carrier will be added to those of the Company, and the delivery of the goods by the Company will be considered as complete, and the responsibility of the Company will be considered to have ceased, when such carriers shall have received the goods for further conveyance. And the Company hereby give notice, that any money which may be received by them as payments for the conveyance of goods by other carriers beyond their own Railway, will be received only for the convenience of the consignors, for the purpose of being paid to such other carriers, and will not be received as a charge made by the Company upon the goods in the capacity of carriers beyond the extent of their own Railway. And the Company hereby give further notice, that they will not be responsible for any loss, damage, or detention that may happen to goods so sent by them, if such loss, damage, or detention occur beyond the limits of their Railway."

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The goods safely arrived at the Paddington terminus, where they were delivered to one Sherman, who was specially appointed by the Company for collecting and delivering goods at the London terminus, in order that he might deliver them to the plaintiff at Brompton. They were placed in Sherman's cart, and delivered at the plaintiff's residence; but one of the cases, which contained glass, fell upon the pavement in its removal from the cart, and so caused the alleged damage. The defendants' charge for carriage included the carriage from Paddington to Brompton.

On the part of the defendants, it was objected, that the declaration was not proved; that the contract proved was to carry from Bristol to Paddington, and not to Brompton. However, the plaintiff had a verdict.

A rule nisi to enter a verdict for the defendants, or for a new trial, having been obtained—

Kinglake, Serjt., now shewed cause.—Contending that there was evidence of a contract to carry to Brompton,

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the receipt note containing the plaintiff's address at Brompton, the place where the goods were to be delivered. That the conditions on the receipt had reference only to cases in which the Company delivered over goods at a station to another carrier only.—He cited *Austin v. The Manchester, Sheffield, and Lincolnshire Railway Company* (a).

Butt and Montague Smith contra.

POLLOCK, C. B.—Clearly there is a variance in the statement of the contract, and no amendment would be of any avail, even if we had the power to make it. The goods were delivered at Brompton, which is beyond the limits of the London terminus of the Railway, and one entire charge was made for the carriage. Then the conditions in the receipt note apply; from which it is evident that the contract that was made at Bristol was, to deliver the goods at Paddington, not at Brompton.

PARKE, B.—I also think that there is clearly a variance in the description of the place at which the goods were to be delivered. The declaration states, that the defendants undertook to carry the goods from Bristol to Brompton. The contract, depending upon the terms of the receipt note, is a contract to carry from Bristol to Paddington. The only difficulty arises from the insertion in pencil of the address of the plaintiff as the person to whom the goods were to be delivered, which is at a place beyond the limits of the railway terminus. But then, in the receipt note, under the head "From what station," there is "Bristol;" and under the head "To what station," there is "Paddington:" and one of the conditions on the other side of the receipt note is, that the Company are not to be responsible for the carriage of goods beyond the limits of their stations. It seems to me that the words "19, Mont-

(a) Ante, p. 300.

w, Brompton," which were written in pencil, a memorandum of the address of the person for goods are to be carried. No amendment could because the goods were safely carried from Bristol, and the damage was occasioned by the at Brompton.

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B.—No doubt, the goods were received by the s to be carried upon the terms and conditions l in the receipt note; and it is plain, that, by the , the Company have expressly shielded themselves responsibility for the carriage of goods beyond the heir stations.

, B.—The contract stated in the declaration is, defendants, as common carriers, undertook to cards in question from Bristol to Brompton. The at the defendants did not receive the goods for use; and I think they did not. The goods were to the defendants at Bristol upon the terms of a ntract there made, and by which alone they un- carry them. Certain conditions are annexed ntract, by one of which the defendants in sub- : "We, the Great Western Railway Company, the goods from Bristol to Paddington and its vicinity, which are to be considered the places will deliver the goods; but as to places beyond ts, we will undertake no responsibility what- at is, so far as they had any control over the y would be liable; but when they ceased to have ol, they would have no further responsibility.

Rule absolute.

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8th.CARR v. THE LANCASHIRE AND YORKSHIRE RAILWAY
COMPANY.

The declaration stated, that the defendants were the owners of a Railway, that the plaintiff delivered to the defendants a horse, to be carried by them for hire on their Railway from A. to B., subject to certain conditions assented to by the plaintiff, and contained in a notice at the foot of the ticket of the defendants, for the conveyance of the horse; which ticket stated that it was issued subject to the owner's taking all risks of conveyance whatsoever, as the Company would not be responsible for any injury or damage (howsoever caused) occurring to live stock travelling upon their line. It then alleged, that, whilst the horse was in the custody of the defendants, it was injured by the horse-box, in which

it was, being propelled against some trucks, through the gross negligence of the Company:—*Held*, *Platt*, B., dissentiente, that the declaration was bad in arrest of judgment; that the defendants had engaged to carry the horse under a special contract, the terms of which were contained in the notice, by which the plaintiff had agreed that the defendants should not be responsible for any loss, although it were occasioned through their negligence.

CASE.—The declaration stated, that the defendants were the owners of the Lancashire and Yorkshire Railway, and were possessed of engines, horse-boxes, &c., for conveying passengers, horses, &c., on the railway as common carriers; that the plaintiff delivered to the defendants a horse, to be carried by them for hire in a horse-box, on their railway from Wakefield to Knottingley, subject to certain conditions assented to by the plaintiff, and contained in a notice at the foot of the ticket or way-bill of the Railway Company for the conveyance of the horse, and which was in these words:—"This ticket is issued subject to the owner's undertaking all risks of conveyance whatsoever, as the Company will not be responsible for any injury or damage, howsoever caused, occurring to live stock of any description travelling upon the Lancashire and Yorkshire Railway or in their vehicles." The declaration then alleged, that, whilst the horse was in the custody of the defendants, and through the improper conduct and gross negligence, and from the want of proper care, skill, and diligence on the part of the defendants, the horse-box was propelled on the Railway against certain trucks, with so great violence that the horse was seriously damaged, and died in consequence thereof.

Plea, not guilty.

The cause was heard before *Alderson*, B., at the last York Assizes; the jury found that the loss had been occasioned by the gross negligence of the defendants; and the plaintiff had a verdict, damages 87*l*.

A rule nisi having been obtained to arrest the judgment—

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Atherton and Cowling now shewed cause.—A carrier at common law is not only bound to take all reasonable care of goods entrusted to him for carriage; but he is also an insurer, from which liability he is relieved only by accidents happening by the act of God, or of the king's enemies: *Wyld v. Pickford* (a), *Beck v. Evans* (b), *Bodenham v. Bennett* (c), *Riley v. Horne* (d), *Ellis v. Turner* (e), *Garnett v. Willan* (f), *Sleat v. Fagg* (g). Notwithstanding such a notice as the present, a carrier is not protected from losses occurring through gross negligence (h). Freedom from liability in such cases is inconsistent with the carrier's duty, and is not binding. [*Parke, B.*—If the plaintiff had sought to enforce the defendants' obligation as common carriers, he ought to have tendered a reasonable compensation for the carriage of the chattel; and, upon their refusing to receive it, he might have sued them upon their common-law liability. Here he has entered into a special contract with the defendants; and, subject to the conditions of that contract, the latter agreed to carry and to deliver the chattel entrusted to them. The plaintiff cannot, therefore, after having entered into that bargain, say that it is not binding upon him. There is nothing illegal in it. The best argument the plaintiff can make use of with reference to the carrier's liability at common law is, that, as he is in such case liable for gross negligence, this contract cannot be construed as exempting him from it.] Then, is it stated that the parties entered into a contract upon the terms contained in the notice? Before the Carriers Act, 11 Geo. 4 & 1 Will. 4, c. 68, it

(a) 8 M. & W. 443.

(b) 16 East, 244.

(c) 4 Price, 31.

(d) 5 Bing. 217.

(e) 8 T. R. 531.

(f) 5 B. & Ald. 53.

(g) Id. 342.

(h) Story on Bailments, 365.

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was necessary to shew distinctly that the notice was brought home to the knowledge of the consignor, otherwise, the notice had no effect. [*Parke, B.*—There can be no doubt that the parties entered into a special contract.—His Lordship referred to *Chippendale v. Lancashire, &c., Railway Company (a)*, *Shaw v. York and North Midland Railway Company (b)*.] If that be so, still the defendants are liable for gross negligence. The contract does not expressly state that the defendants are not to be liable in that case; and such an express condition would have been wholly repugnant to the validity of the defendants' undertaking: *Furnivall v. Coombes (c)*, *Stuart v. Crawley (d)*. At any rate, the declaration is sufficient after verdict.

Wilkins, Serjt., and Tomlinson, who appeared in support of the rule, were not called upon.

PARKE, B.—The question in this case turns wholly upon the construction of the notice at the foot of the ticket or way-bill, given by the defendants and assented to by the plaintiff, and which forms the foundation of the contract between the parties. In the first place, it is perfectly clear, that, since the passing of the Carriers Act, it is competent for a carrier to make a special contract to convey; and it is equally clear that his liability may be made to depend upon the terms of that contract, into which both parties have entered. Here the parties have entered into a special contract, and consequently the only question is what is its meaning. According to the old cases, the construction of carriers' notices had this limitation put upon them, that, according to the ordinary terms of the notice they would be responsible for gross negligence, unless the

(a) 21 L. J., Q. B., 22.

(b) Ante, Vol. 6, p. 87; 13 Q.

B. 347.

(c) 5 M. & Gr. 736.

(d) 2 Stark. 323.

ded their liability in express terms. The practice of carriers protecting themselves by mere notices was put an end to by the Carriers Act. Now, whether or not the defendants are liable as common carriers, according to the rule of the common law, that is, whether they are bound to carry safely and securely, and are only exempted from that description of loss which arises from the act of God and the King's enemies, is a question which there is no necessity to discuss upon the present state of the record. If it had been the intention of the plaintiff to make the defendants liable as common carriers, he ought to have tendered them a reasonable sum for the carriage of the chattel, and, upon their refusal to carry, to have brought an action for not carrying. Whether the plaintiff would have succeeded, is a matter into which we need not enter. Most certainly, every common carrier is bound only to carry goods of that description which his public calling requires him to carry. That is established in the case of *Johnson v. The Midland Railway Company* (a). We are not called upon to consider the duties of the defendants in that character, inasmuch as these parties have entered into a special contract; and we have only to give it its true meaning. Prior to the time of the establishment of railways, the Courts were in the habit of construing contracts between individuals and carriers to the disadvantage of the latter. By the introduction of railways, a new description of property was created, and many articles are now transferred from one place to another which had not been commonly carried before.

Sheep and other cattle are now ordinarily carried on railways; and even horses, by means of which the conveyance of goods was effected, are now themselves the objects of conveyance. The present case is an instance of this change; contracts are now made with reference to this new state of things, and it is very reasonable

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(a) Ante, Vol. 6, p. 61; 4 Exch. 367.

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that carriers should be allowed to make agreements for the purpose of protecting themselves against the new risks and dangers of carriage to which they are in modern times exposed. Horses are not conveyed on railways without much risk and danger. The rapid motion, the noise of the engine, and various other matters, are apt to alarm them and to cause them to do injury to themselves. It is, therefore, very reasonable that carriers should protect themselves against loss by making special contracts. The only question here is, whether the defendants have protected themselves against loss arising from their gross negligence in carrying the plaintiff's horse. The jury have found that the defendants have been guilty of gross negligence; and therefore it may be taken upon this record that the breach, if any, of the contract was so occasioned. Now, I am of opinion, that, by entering into this contract, with reference to the subject-matter, the owner has taken upon himself all risk of conveyance; and that the Railway Company are bound merely to find carriages and propelling power. The contract appears to me to amount to this. The Company say they will not be responsible for any injury or damage, however caused, occurring to live stock of any description travelling upon their Railway. This, then, is a contract by virtue of which the plaintiff is the party to stand all risks of accident and injury of conveyance; and certainly, when we look at the nature of the thing conveyed, there is nothing unreasonable in this arrangement. In the case decided by the Court of Common Pleas, of *Austin v. The Manchester, Sheffield, and Lincolnshire Railway Company* (a), the language of the contract was slightly different from the present. There the ticket was issued "subject to the plaintiffs' undertaking to bear all the risks of injury by conveyance and other contingencies; and the plaintiffs were required to see to the efficiency of the carriages," and the defendants were not to be responsible for

(a) Ante, p. 300.

damage caused to horses &c. travelling upon the rail-
 . In that case, the accident was occasioned by the wheels
 being properly greased; in the present case, the car-
 e that contained the plaintiff's horse was driven against
 her carriage. For the purposes of this decision, these
 notices may be considered as in effect the same. It
 ot for us to fritter away the true sense and meaning
 hese contracts, merely with a view to make men care-

If any inconvenience should arise from their being
 ured into, that is not a matter for our interference; but
 must be left to the legislature, who may, if they please,
 a stop to this mode which the carriers have adopted
 imiting their liability. We are bound to construe the
 ds used according to their proper meaning; and, ac-
 ding to the true meaning and intention of the parties,
 ere expressed, I am of opinion that the defendants are
 liable.

ALDERSON, B.—I am also of the same opinion. In this
 e the defendants undertook to carry the chattel in ques-
 n on certain terms. What, then, are those terms? It is
 ar they are such as the defendants might lawfully make
 a subject of a special contract. It is plain to me, that
 ey undertook to carry the plaintiff's horse at his risk.
 ey might do that. The words used are, "the owners
 ertaking all risks of conveyance whatsoever." Possi-
 a question might be raised whether the injury con-
 nplated was not such as might issue in injury to the
 ing conveyed, so that a doubt might arise whether the
 e of the horse being stolen was contemplated, as, under
 h circumstances, the accident would not issue in injury
 the horse conveyed. But that question would not arise
 re, as in this case the horse itself has been injured.
 re the parties in effect agree that the plaintiff, and not
 e defendants, shall be responsible for any injury occa-

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sioned by gross negligence on the part of the defendant and consequently the Company are protected against liability of this description by virtue of the express contract.

PLATT, B.—This declaration states that the defendants were guilty of gross negligence; and that fact was proved. The gravamen of the charge is the gross negligence of the defendants; and the question is, whether the terms upon which they received the plaintiff's horse absolve them from the loss occasioned by their misconduct. Now, undoubtedly, since the establishment of railways, new subjects of conveyance have arisen. Formerly, horses were seldom carried, but now they are ordinarily conveyed upon the trains. It is therefore to be observed, that stipulations are necessarily made, in order to guard carriers from the risks which are incidental to this new mode of conveyance. It has been suggested, that the animal may be alarmed by the noise of the engine, by the speed of the carriages, and by various other causes; that this ticket provides against such new dangers; and that, unless we take upon ourselves the office of legislation, this ticket absolves the carriers from their gross misconduct. I am very much startled by such a proposition; though considering the high authority by which it is supported, I feel I ought to doubt and mistrust my own opinion. I am bound to say, that I am not satisfied that the language of this ticket absolves the Railway Company from such liability for damage. I cannot help thinking, that the owner of the goods never dreamed of such a thing when he signed the contract. In truth, this accident has nothing to do with the conveyance of the horse. The accidents referred to are those which occur whilst the article is in a state of locomotion. The case of gross negligence, as it seems to me, is not pointed at by the ticket.

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MARTIN, B.—I agree in opinion with my Brothers *Parke* and *Alderson*. It is perfectly clear that this is the case of a special contract, which the plaintiff has adopted and assented to, and which is set out in his declaration; and by that contract he agreed that the horse in question should be carried upon certain conditions. No doubt, at common law, a carrier may enter into a special contract. He may, it is true, be bound to carry goods; and if he refuses to do so except on the terms of a special contract, he may subject himself to an action for that breach of duty; but if a special contract be entered into by him and the party sending the articles, both sides are bound by the terms of that contract. The Carriers Act says, that a special contract may be made. If that be so, all that we have to do is to see what that contract is. Insurers of goods to be conveyed are answerable for the gross negligence of the carrier or of his servants, whether the goods be insured or not; the parties who have the care of such goods may contract that they will not be answerable for their own gross negligence. It seems to me, that the parties here could not have used language clearer or stronger than that which they have adopted. We cannot enter into the question of what was passing in the mind of the owner of the horse at the time he assented to these terms; we must look only at the notice. Now, if the carrier had been desirous of preparing a contract for the express purpose of getting rid of his liability in respect of gross negligence, he could not have used more apt words than those that are set forth upon the face of this document. The argument of inconvenience is no test of the matter. We have nothing to do except to carry out this contract; the parties concerned, and not ourselves, are to judge of the inconvenience. If we hold the carriers in this case responsible for gross negligence, we shall place them in the situation of insurers. There are, indeed, inconveniences attending either mode of construing the con-

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tract. My opinion is founded upon the true construction and meaning of this notice or contract; and I think that by its terms the defendants are not answerable for any injury or damage arising from their gross negligence in the course of the conveyance. The declaration is, therefore, insufficient, and the judgment must be arrested.

Rule absolute (a).

(a) See *The Great Northern Railway Company v. Morville*, post.

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Nov. 10th. THE DUBLIN AND WICKLOW RAILWAY COMPANY v. BLACK.

To an action for calls, a plea of infancy should allege a repudiation of the contract within a reasonable time after the defendant became of full age.

DEBT for calls, in the statutory form.

Plea.—That, before the making of the several calls, and before the plaintiffs were incorporated, the defendant contracted with certain persons, then promoting the incorporation of the plaintiffs, to take the said shares, and then subscribed to the capital of the then intended corporation of the plaintiffs to the amount of the said shares; that he became and was the holder of the said shares, by reason and in consequence of his having so contracted for the said shares and so subscribed, and not otherwise; that, at the time of his so contracting and subscribing for the said shares, the defendant was an infant within the age of twenty-one years. That, after the defendant had so contracted and subscribed for the said shares, and after the defendant had become and was of the full age of twenty-one years, he the defendant disaffirmed and repudiated his said contract and subscription; of which said disaffirmance and repudiation the plaintiffs then had due

That the defendant never, after he attained his age, and before he so disaffirmed and repudiated as void, ratified or affirmed the said contract or the said subscription, or derived any benefit from the said shares, exercised any authority over them or any or either of them, or had any possession of any certificate or other instrument of title relating to them or to any or either of them, or did any act or otherwise demean himself as the owner of the said shares. That he the defendant cannot shew, nor could he at any time since the commencement of this suit have ascertained, the names of the persons with whom he so contracted as aforesaid, or any or either of them, without being put to costs.—Verification. Special demurrer, that it is not expressed in the plea that the defendant disaffirmed and repudiated his contract and subscription, either before he became of age or at a reasonable time after; and that it does not appear that the defendant did not disaffirm and repudiate the contract and subscription after the calls became pay-

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person, in support of the demurrer (a).—The decision in the case of *The Cork and Bandon Railway Company v. The Great Southern and Western Railway Company* (b) has been qualified by *The North Western Railway Company v. M'Michael* (c), where this Court decided, that an infant might repudiate the contract. But the repudiation must be during infancy, or within a reasonable time after he has attained his full age. In *Holmes v. Blogg* (d), Lord C. J., says, "I agree that, in every instance of a contract voidable only by an infant on coming of age, the infant is bound to give notice of disaffirmance of such contract in reasonable time." The defendant, by not repu-

Before Pollock, C. B., Alderson, Platt, B., and Martin, B.
10 Q. B. 935.

(c) Ante, Vol. 6, p. 618; 5 Exch. 114.

(d) 8 Taunt. 35.

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diating within a reasonable time, prevents the Company from allotting the shares to others.—He cited *Kelley case* (a) and *Evelyn v. Chichester* (b).

Addison contra.—The case is not like that of a lease but resembles an agreement for a lease, which is void against an infant, and not merely voidable; and in the case the general plea of infancy is sufficient. [*Martin*, —Is it open for you to contend that this is a void contract after the decisions?] If not, this plea discloses sufficient repudiation: *The Newry and Enniskillen Railway Company v. Combe* (c), *The North Western Railway Company v. M'Michael* (d). [*Alderson*, B.—It should be alleged when the repudiation took place.]

PER CURIAM.—The plea is clearly bad, for not alleging that the defendant repudiated within a reasonable time after he became of full age.

(a) Brownl. 120; Cro. Jac. Exch. 565.
 320; 2 Bulst. 69.

(b) 3 Burr. 1717.

(c) Ante, Vol. 5, p. 633; 3

(d) Ante, Vol. 6, p. 618; 5
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“Waterford, Wexford, Wicklow, and Dublin Railway.

“Offices of the Company, 449, West Strand,

“London, June 11, 1845.

“Sir,—The Provisional Committee having allotted to you fifty shares of 20*l.* each in this undertaking, I am instructed to request that you will pay a deposit upon them of 1*l.* 10*s.* per share, on or before the 30th instant, to one of the following bankers, who will sign the receipt at the foot hereof.

“I also beg to inform you, that scrip certificates for the above number of shares will be delivered to you, in exchange for this letter and the banker’s receipt for the deposit, after the execution of the parliamentary contract and subscribers’ agreement, which will lie for your signature at this office on and after Monday, the 30th instant, or at the offices of Mr. George Little, solicitor, Wexford; and 19, Westmoreland-street, Dublin.

“Be pleased to observe that this letter, with the banker’s receipt attached, should be produced when you attend to execute the deed.

“I am, &c.

“The shares allotted to you will be considered forfeited if the deposit be not paid within the period specified above; and the parliamentary contract and subscribers’ agreement must be signed on or before the 20th August, 1845.

“No.

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“Received on account of the Provisional Committee of the Waterford, Wexford, Wicklow, and Dublin Railway,
—— Pounds, ——, to account for on demand.

£

”

The defendant paid the deposit on fifty shares on the 17th of June, to one of the Company’s bankers; but he never signed the parliamentary contract or subscribers’ agreement, nor was he called upon to do so, nor did he

any other act with regard to the Company. The requisite capital having been subscribed, the Company was incorporated. On the part of the defendant it was submitted, that, under the above circumstances, he was not a shareholder. The learned Judge, being of that opinion, non-suited the plaintiffs, reserving leave to the plaintiffs to move to enter a verdict for them.

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Hugh Hill now moved.—The substantial question is, whether the name of the defendant was rightly placed on the register of shareholders. If he is “a subscriber” within the 8 & 9 Vict. c. 16, (the Companies Clauses Consolidation Act), he was. The word “shareholder” means “shareholder, proprietor, or member of the Company” (a). It is further enacted, by sect. 8, that “Every person who shall have subscribed the prescribed sum or upwards to the capital of the Company, or shall otherwise have become entitled to a share in the Company, and whose name shall have been entered on the register of shareholders hereinafter mentioned, shall be deemed a shareholder of the Company.” The defendant was therefore a shareholder; for he subscribed, and his name was entered on the register. The fact, that the number of shares allotted to the defendant was less than he applied for, is immaterial, for he assented to receive them: *Fox v. Clifton* (b). The execution of the parliamentary contract and subscribers’ agreement was not a condition precedent to the defendant becoming a shareholder. It was a stipulation for the benefit of the Company, which they might and have dispensed with, by adopting the payment and placing the defendant’s name on the register of shareholders. This case is distinguishable from *Hutton v. Thompson* (c), for here the Company was never in fact established. [Allerton, B.—Reading the 21st section, it is manifest that

(a) Sect. 3.

(b) 6 Bing. 776.

(c) 3 H. L. Cas. 161.

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the persons entitled to be put upon the register are persons who have subscribed for the whole sum, that is, undertaken to pay the whole sum by such calls as shall afterwards made. A person would have no right to be placed on the register by merely paying a deposit.]—I also cited *Bourne v. Freeth* (a), *The West Cornwall Railway Company v. Mowatt* (b), and *Pitchford v. Davis* (c).

PARKE, B.—I think that there ought to be no rule. The 8 & 9 Vict. c. 16, s. 28, renders the sealed register of shareholders *prima facie* evidence of a defendant being a shareholder, and of the number and amount of his shares. This is a hard case, for the Company, having the control of the register, may put the name of any person on it, and thus throw upon him the burthen of proving that he is not a shareholder. No doubt the legislature presumed that the power would be fairly and properly exercised. Then, in this case, it is incumbent on the defendant to shew that he is not a shareholder. Here the defendant proposed to the provisional committee to subscribe for 100 shares. That offer was not accepted; but there was a proposal from the Company that he should have fifty shares. The term “subscriber” is explained by the 8th section, which enacts that “every person who shall have subscribed the prescribed sum or upwards to the capital of the Company, or shall otherwise have become entitled to a share in the Company that is, subscribed so as to be entitled to a share in the Company, “and whose name shall have been entered on the register of shareholders,” shall be deemed a shareholder. The question therefore is, whether the defendant has subscribed so as to become entitled to a share in the Company. The proposal made by the Company is contained in the letter of allotment, by which the defendant is informed that the provisional committee have allotted to him

(a) 9 B. & C. 632. (b) 15 Q. B. 521. (c) 5 M. & W. 2.

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gister. That shews *prima facie* that he is a shareholder. Then, in answer, he says, "I will shew that you ought not to have put my name on the register; you had no authority for so doing." Then what is the authority? The 9th section requires the Company to keep a book, to be called the "Register of Shareholders;" and by the 8th section they can only insert on that register the names of persons who have become entitled to a share in the Company. Then, let us see who is entitled to a share in the Company—"every person who shall have subscribed the prescribed sum or upwards to the capital of the Company. Therefore, the only authority the Company has, is to put the names of those persons on the register. Then is the defendant a person who has "subscribed the prescribed sum," and what is the meaning of that term? Looking to the 21st section, I think it means a person who, thus subscribing, makes himself responsible, not only for the deposit, but also for the whole sum capable of being levied by calls. The defendant is not a person in that situation. By his offer to the Company he says, "I wish you to assign me one hundred shares; I will pay the deposit—I will subscribe." They reply, "You may have fifty shares; pay the deposit, subscribe, and you shall have scrip certificates," that is, certificates of having subscribed. But though he has paid the deposit, he has not subscribed the prescribed sum, and therefore is not responsible within the 21st section; and, consequently, the Company had no authority to put his name on the register. In point of fact, the 20th of August is the limit of time within which the Company bind themselves to accept the subscription. The *prima facie* case of liability has been answered, and the plaintiffs were properly nonsuited.

MARTIN, B.—I am also of the same opinion. I should be sorry if the Act of Parliament were found to authorise these Companies to put a person's name on the list.

shareholders, who did not, by his contract, agree that it should be placed there. Now, this contract amounts to nothing more than an agreement to pay the deposit and become a shareholder; and if there is any right of action against the defendant (which I do not think there is, for I concur with my Brother *Parke* that it is open to a person to elect to forfeit the deposit), it is for the breach of that agreement. The persons to be put upon the register are those entitled to shares, that is, persons who have a right to require the Company to give them shares. The defendant has no such right, because he has not fulfilled the terms upon which the shares were offered. The legislature, no doubt, meant that, in order to become a subscriber, a person should put his name to some document which would speak for itself, and thus authorise the putting his name on the register.

POLLOCK, C. B.—I am of the same opinion. The difficulty arises from the ambiguous meaning of the word “subscribe,” which means, in some phrases, the consent to pay a sum of money; in others, the assent to some particular thing, such as an article of faith. This statute uses the word “subscribe” in its literal sense, viz. putting down a person’s name for some interest in the capital of the Company; and that the defendant never did. Even assuming, that, if a person paid the whole sum, he would be entitled to a share, whether he had signed the deed or not, the mere payment of this small sum, which is collected for a special purpose only, is by no means to be considered as a subscription.

Rule refused.

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Hilary Term, 1852.

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An interim manager is not the same as the official manager under the Winding-up Act, 11 & 12 Vict. c. 45; and therefore the 73rd section of that Act does not apply where only an interim manager has been appointed.

A RULE had been obtained in this case calling upon the plaintiff to shew cause why all proceedings on the judgment recovered in this action should not be stayed until after proof, or exhibiting, or making such proof as the plaintiff might be able, of his debt or demand, before the Master in Chancery to whom the winding up of the affair of the Pennant and Cragven Consolidated Lead Mining Company had been referred, pursuant to the Joint Stock Companies Winding-up Act, 11 & 12 Vict. c. 45.

From the affidavits it appeared that the Company was formed in the year 1848, and that this action was commenced in June, 1851, against the defendant, a shareholder in the Company, to recover the price of goods sold to the Company. Notice of trial had been given for the 13th of November; but, on the 7th, the defendant consented to a Judge's order to stay proceedings on payment of debt and costs on the 15th of December, and in default thereof the plaintiff was to be at liberty to sign final judgment and issue execution. On the 15th of December the plaintiff was served with notice that an order had been obtained under the 11 & 12 Vict. c. 45, for winding up the affairs of the Company, and that an interim manager had been appointed. Default having been made payment of the debt and costs, the plaintiff signed final judgment on the 16th of December, and issued execution on the 17th, under which the sheriff levied on the defendant's goods; but, before they were sold, a summons was taken out before *Martin, B.*, to stay the proceedings; and his Lordship ordered that the amount of the execution should be paid into Court to abide the event of this rule.

B. C. Robinson shewed cause.—First, this is an application against good faith after the consent to the Judge's order: *In re Sudlow* (a). Secondly, the Court has no jurisdiction to stay proceedings under the 73rd (b) section of the 11 & 12 Vict. c. 45, because no official manager has been appointed; the character and duties of an interim manager are perfectly distinct, his authority is limited to the preservation of the estate until an official manager is appointed. The 58th section enacts, "that, except as is by that Act expressly provided," nothing therein contained shall affect the rights and remedies of creditors.—Further, the sheriff has already levied execution; and consequently, quoad the plaintiff, the matter is at an end. *Macgregor v. Keily* (c) does not apply; for there an official manager had been appointed, and the application was before execution.—He also referred to *Prescott v. Hadow* (d), and 12 & 13 Vict. c. 108, s. 7.

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Bramwell contra—The interim manager and official manager are, in truth, the same officer, the only difference being, that the appointment of the one is permanent, that of the other temporary. [*Alderson*, B.—Is that so? The duties of an interim manager are simply to collect the property and pay the judgment debts of the Company (sect. 20);

(a) 19 L. J., Chanc., 524.

(b) Which enacts, "That, after the first appointment of an official manager, no creditor or other person shall, except so far as the Master shall permit, have power to commence or to proceed with any action against the official manager or against the Company, or any other person representing the same, or who is sued as a contributory thereof, until after proof, or exhibiting or making such proof as he may be able, of his debt or demand before the

Master, as hereinafter mentioned; and it shall be lawful for any Judge of the Court in which such action shall be pending, upon summons taken out before him for that purpose, to order that all further proceedings in such action shall be stayed until after such proof shall have been made or exhibited before the Master."

(c) Ante, Vol. 6, p. 208; 4 Exch. 801.

(d) 5 Exch. 726.

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the official manager is to make up the accounts, sell the estate, wind up the affairs of the Company, pay the debts and distribute the surplus assets among the parties entitled (sect. 34). Looking, therefore, to their different duties, it seems evident that the provisions of the 73rd section are confined to cases in which an official manager is appointed. The interim manager is to act as a receiver and protect the assets; the official manager is to settle the affairs of the Company. If an interim manager is the same officer as an official manager, why should the legislature say, that, "until an official manager shall be appointed, the Master may appoint an interim manager. If, indeed, an interim manager were appointed, and then an official manager, and the latter died, the 73rd section would apply, because it says, "after the *first* appointment of an official manager," &c.] The legislature clearly contemplated the proof of debts before the appointment of an official manager (sect. 72). The 20th section provides that no action shall be brought by or against any interim manager otherwise than by the style and designation of the official manager. That section is explained by the 50th, which enables dissolved Companies to sue and be sued in the name of the official manager. Those sections are a legislative interpretation of the meaning of the term "interim manager." It is immaterial that the plaintiff has proceeded to judgment, the action being still pending.

POLLOCK, C. B.—I think that this rule ought to be discharged. The statute in question has given rise to much discussion and doubt; and it is not advisable to express an opinion upon any point not necessary for the disposal of this case. It appears to me that the statute makes a distinction between an interim and an official manager, and that distinction is sufficient to dispose of this rule. Mr. *Bramwell* insists before us that an "interim manager" is only another name for the "official manager;" and

some members of the Court 'entertained sufficient doubt upon the point to render it worthy of consideration. But we are now satisfied that there is not so clear an identity between the interim manager and official manager as to prevent the plaintiff from having the benefit of the 58th section, which enacts, that nothing in that Act contained shall affect the rights of creditors, "except as therein expressly provided." It is sufficient to say, that this case is not expressly provided for. The application is founded on the 73rd section, which enacts, that, after the first appointment of an official manager, proceedings shall be stayed until proof before the Master; and it is admitted that here there has been no such appointment. It is enough to say, that the construction of the statute is sufficiently doubtful to prevent us from interfering. And as this is an appeal from the decision of a Judge at Chambers, the rule must be discharged with costs.

PARKE, B.—I am of the same opinion; though, when the motion was made, I felt some doubt whether the term "official manager" might not be construed to include the interim manager, seeing that the 73rd section prohibits proceedings against the official manager until after proof: and by the 20th section an interim manager can only be proceeded against by the style of official manager, and in the same manner and with the same effect as if an official manager were appointed. But, on full consideration, that doubt is removed. It is best to adhere to the ordinary grammatical construction of a statute, unless it leads to an apparent inconsistency or absurdity. The words "official manager" must be understood in the sense in which they are previously used, namely, a manager having the entire control over the property of the Company. It is unnecessary to express any opinion on the other point.

ALDERSON, B.—I also agree with the rest of the Court. If the goods had been converted into money, there could

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have been no doubt as to the second point, for then the plaintiff would have ceased to be a creditor. It is not necessary, however, to decide that question. As to the main point, I have no doubt. There is a broad distinction between an interim manager and an official manager. In the first place, the 20th section says, "that in the meantime, and until an official manager shall be appointed, and from time to time when there shall be no official manager," it shall be lawful for the Master to appoint an "interim or provisional manager of the property, assets, and effects of the Company." That of itself shews a distinction between the two managers, for the one is to be appointed until the other is appointed; and if they were identical, "interim" would be a very absurd expression, to say the least of it. Then we find that the interim manager has the property of the Company put into his possession only thus far—he has power to collect debts and satisfy judgments, to prosecute and defend actions brought against the Company, and to do all things necessary for the purpose of protecting their property. Then the latter part of the 20th section says, that the interim manager may be sued as the official manager. If he is the official manager, why enact that he shall be sued as such? Then we find, that when the official manager is appointed he has different duties to perform. The interim manager has not the books of accounts put into his hands, and therefore has not the means of managing the affairs of the Company, though he may protect them by suing or being sued. The official manager, on the other hand, has all the books and papers of the Company put into his possession; and it is his duty to make out lists of the persons who have claims against the Company, and to place them before the Master who is to wind up the affairs of the Company. These are some of the duties of an official manager as distinguished from those of an interim manager; and this difference of duties shews that, when

the legislature speaks of the official manager, it does not mean to include the interim manager. Then, by the 73rd section, when any person has sued a contributory for debts of the Company, the suit is not to be stopped until after the appointment of an official manager, that is, until after the appointment of a person who has those peculiar duties to perform which belong to the official manager. That is the plain sense of the Act.

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PLATT, B., concurred.

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Feb. 11th.

ASSUMPSIT for use and occupation of certain rooms of the plaintiff. Plea, non-assumpserunt.

The cause was tried before *Platt*, B., at the Middlesex Sittings in last Michaelmas Term, when it appeared that the action was brought to recover three quarters of a year's rent for certain rooms and offices of the plaintiff in Duke-street, Westminster, from the 16th of March to the 16th of December, 1849. In the year 1846, the solicitors of the defendants, an incorporated Company, were in the occupation of certain rooms on the ground floor of the plaintiff's house; but finding that they were insufficient for the purposes of carrying on the business of the Company, they entered into negotiations with the plaintiff for the taking of the rooms on the second floor also; and, on the 5th of December, 1846, the solicitor of the defendants wrote the following letter to the plaintiff:—"I am authorised by the directors of the Bristol and Exeter Rail-

A corporation agreed by parol to take, and occupied, premises for a year; they did so occupy and also for another year, at the end of which period they removed their goods without any previous notice, having paid a quarter of the current year's rent:—*Held*, that they were not liable for the remainder of the year's rent, not having occupied the premises, and the contract arising by payment of rent not being binding on the corporation.—

Seemable, that, if the plaintiff had, by deed, demised the premises to the defendants as tenants from year to year, and they had accepted the tenancy, that would have created such an interest as would have rendered the defendants liable.

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way Company to take the floor above that we rent of you at the price and for the time named by you: namely 100*l.*; time, one year from the 16th instant; and you will therefore please to consider the rooms our's accordingly. The plaintiff having acceded to these terms, the directors of the Company furnished the rooms, and occupied them from that time to the 16th of December, 1848, when they removed all their furniture and effects, and left the keys in the doors. They paid the rent up to the 16th of March, 1849.

The plaintiff contended, that the defendants were tenants from year to year; and that, not having given notice to quit, they were liable for the rent sought to be recovered. The defendants on the other hand contended that, as they had not occupied the premises during the time in question, they were not liable for use and occupation, citing *Diggle v. The London and Blackwall Railway Company* (a). They also relied upon the 145th (b) and 147th (c) sections of the Company's Act, 6 Will. 4, c. xxxvi. A verdict was entered for the plaintiff for the amount claimed, with leave for the defendants to move to enter nonsuit.

A rule nisi having been obtained,

Warren and *Milward* now shewed cause (d).—To the general rule, that a corporation cannot bind itself except by deed, there are exceptions: First, a corporation may be bound by a contract, the subject-matter of which is of frequent occurrence, and is of an insignificant character. The occupation of rooms is of that description. [*Alderson*

(a) Ante, Vol. 6, p. 590; 5 Exch. 442.

(b) Which enacts (inter alia), "That the directors for the time being of the said Company shall superintend all the affairs thereof, and have power to use the common seal of the Company on their behalf," &c.

(c) Which enacts, "That all

contracts and agreements in writing relating to the affairs of the said Company, which shall be signed by any three of the directors of the said Company, shall be binding on the said Company and all other parties thereto, &c.

(d) Before *Parke*, B., *Alderson*, B., *Platt*, B., and *Martin*, B.

B.—But to bring the case within that exception, you must shew that the dispensing with the corporate seal is a matter of convenience, amounting almost to a necessity. That was the principle of the decision in *Church v. The Imperial Gas Light and Coke Company* (a), and since acted upon in *The Mayor of Ludlow v. Charlton* (b), *Lamprell v. The Guardians of the Billericay Union* (c), and *Diggle v. The London and Blackwall Railway Company* (d). Can it be contended that the occupation of premises for a year is either a matter of daily occurrence, or of so trivial a character as to require the dispensation with the corporate seal? There is a distinction between contracts for use and occupation and other contracts: *The Dean and Chapter of Rochester v. Pierce* (e). In *The Mayor of Stafford v. Till* (f), *Best*, C. J., says:—"Where a party has occupied land, the contract between him and the landlord must be considered as executed, so that there is no necessity for alleging in the declaration any express promise to pay: from the fact of occupation a promise to pay will be implied: although in an executory contract the plaintiff must rest his case upon an express promise; and where that is so, if one of the parties is not in a condition to enter into a promise, he cannot take advantage of a promise by the other, because there would be no mutuality in the contract." *The Barber Surgeons of London v. Pelson* (g), *The Mayor and Burgesses of Carmarthen v. Lewis* (h). [Parke, B.—But here the defendants have not occupied; and it is difficult to see how they can be made responsible, not having occupied during the time for which the rent is sought to be recovered. They could not become tenants from year to year except by contract; and they are incapable of contracting unless under seal, or in the mode prescribed by the statute.

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(a) 6 A. & E. 846.

(b) 6 M. & W. 815.

(c) 3 Exch. 283.

(d) 5 Exch. 442.

(e) 1 Camp. 466.

(f) 4 Bing. 75.

(g) 2 Lev. 252.

(h) 6 Car. & P. 608.

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The authorities referred to are cases in which corporations permitted others to enjoy their property; and a corporation may well give permission for that purpose, though themselves incapable of contracting.] But it is submitted that the same principle applies, whether the action is by or against the corporation: *Naish v. Tatlock*(a). [*Parks, B.*—If the defendants had occupied by the permission of the plaintiff they would have been bound to pay, but they have not occupied. Then, the question is, whether there is any holding; and in order to establish that, the plaintiff must prove a contract valid in law. *Predyman v. Wodry*(b) is an authority that a lease for years cannot be made to a corporation without deed.] A corporation aggregate may be sued in assumpsit on an executed parol contract: *Beverley v. The Lincoln Gas Light and Coke Company*(c). Then *Patteson, J.*, says, “The action for use and occupation is established by the stat. 11 Geo. 2, c. 19, s. 14, and, according to the words of the statute, may be maintained ‘where the agreement is not by deed.’ Some agreement seems to be implied as the foundation; though it is well established that it need not amount to a formal demise, or even be express. To hold, then, that a corporation is within the statute, is to hold that it may be a party to an agreement not under seal, at least for the purpose of suing on it; and it would be rather strong to deny, at the same time, that it could be a party to it for the purpose of being sued on it:” *DeGrave v. The Mayor and Corporation of Monmouth*(d) *The Mayor of Ludlow v. Charlton*(e), *Standen v. Christmas*(f), *Mayor of Newport v. Saunders*(g), *Lumley v. Hodgson*(h).

Assuming that an action for use and occupation lies against a corporation on an executed parol contract, it

(a) 2 H. Bl. 320.

(b) Cro. Jac. 109.

(c) 6 A. & E. 839.

(d) 4 Car. & P. 111.

(e) 6 M. & W. 815.

(f) 10 Q. B. 135.

(g) 3 B. & Ad. 411.

(h) 16 East, 99.

defendants, having quitted without giving any previous notice, are liable. It is sufficient, *prima facie*, to shew an occupation by the defendants: *Harland v. Bromley* (a), *Ward v. Mason* (b), *Redpath v. Roberts* (c), Selw. N. P. Vol. 2, 1387, 10th ed. [*Parke*, B.—But there must be a binding agreement on the part of the defendants to occupy for a longer period than they have done. The objection here is, that there was no proof of such a contract as the law considers binding. Payment of rent is only a circumstance from which a contract may be implied. The difficulty is to see when the tenancy was created.] It was created upon the payment of the first quarter's rent. [*Martin*, B.—Payment of rent does not of itself create a tenancy from year to year, but is only evidence from which a jury may infer the fact: *Jones v. Shears* (d).]—They also cited *Paine v. The Guardians of the Strand Union* (e), *The Fishmongers' Company v. Robertson* (f), *Sanders v. The Guardians of St. Neots Union* (g), *Yarborough v. The Bank of England* (h), *The Eastern Counties Railway Company v. Broom* (i), *Maund v. The Monmouthshire Canal Company* (k), *Rex v. The Regent's Canal Company* cited in *Regina v. The Birmingham and Gloucester Railway Company* (l), *The Dean and Chapter of Rochester v. Pierce* (m), and *The Mayor of Stafford v. Till* (n).

Kinglake, Serjt., and *C. Rowe* contra, were not called upon.

PARKE, B.—I am of opinion that this rule ought to be made absolute. The defendants, a corporation aggregate,

(a) 1 Stark. N. P. 455.

(b) 9 Price, 291.

(c) 3 Esp. 225.

(d) 4 A. & E. 832.

(e) 8 Q. B. 326.

(f) 5 M. & G. 131.

(g) 8 Q. B. 810.

(h) 16 East, 6.

(i) Ante, Vol. 6, p. 743; 6 Exch. 314.

(k) 4 M. & G. 452.

(l) Ante, Vol. 3, p. 148; 2 Q. B. 55.

(m) 1 Camp. 466.

(n) 4 Bing. 75.

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originally agreed by parol to take the premises in question for a year. Whether or no that agreement was binding, it is not necessary to determine; for, having occupied, they became liable, according to the authorities, to pay rent for the period they occupied; and in respect of that an action for use and occupation would lie. At the end of the year they continued to occupy for another year; and that period having expired, they removed their goods without any previous notice, but in the course of the following year paid a quarter's rent. The plaintiff now seeks to recover for the remaining three quarters of the year during which the defendants did not occupy. In order to render them liable, it is sought to make out a constructive occupation; but that can only arise from contract, and the defendants cannot contract unless under seal, or in the statutory mode. The difficulty I entertained is, that the defendants did not occupy; and consequently this case is not within the authorities which decide that a Company may be liable on a contract, though not under seal. The expressions of my Brother *Patteson*, in delivering the judgment of the Court in *Beverley v. The Lincoln Gas Light and Coke Company*, would certainly seem to imply that a corporation could, under such circumstances as these, enter into a parol agreement for a yearly tenancy; but although that judgment may be supported on other grounds there are several recent cases in which the power of corporations to bind themselves without seal has been discussed, and in which the doctrine there laid down has been disclaimed: *The Mayor of Ludlow v. Charlton* (a), *Church v. The Imperial Gas Light and Coke Company* (b), *Paine v. The Guardians of the Strand Union* (c). The cases in which corporations can bind themselves without seal are, where there is a parliamentary charter, shewing an intention that the corporation should be bound by contract

(a) 6 M. & W. 815. (b) 6 A. & E. 846. (c) 8 Q. B. 326.

of a particular description, though not under seal. *Beverley v. The Lincoln Gas Light and Coke Company* may be supported on that ground, for their parliamentary charter evidently contemplated that they might purchase articles necessary for a gas company without contract under seal; or where the case falls within the ancient common-law exceptions, which are simply confined to orders given by a corporation with a head, such as the appointment of a servant, and small matters of that description, upon which an action lay for wages, although the appointment was not under seal. No case has gone the length of saying that a corporation may bind itself by a contract not under seal, which does not range within either the small services excepted by the common law, or contracts authorised by parliamentary charter. This Company can only bind themselves by their common seal, or in the statutory mode. Then can they contract for any interest in land, except by an instrument under seal, or executed in the manner which the statute prescribes? I am clearly of opinion that they cannot. If, indeed, instead of being a corporation, the defendants had been a private individual, who, after having occupied for a year, might by parol contract to hold for another year, or as tenant from year to year, his conduct in continuing in possession after the expiration of the term for which he originally took the premises, would be evidence for the jury that he and the plaintiff had mutually contracted with each other that there should be a demise for another year, or even from year to year. But that would be on the ground of an implied contract, arising from the conduct of the parties. These defendants, however, being a corporation, cannot contract by conduct, but only by a binding agreement under seal, or in the statutory mode; so that no fresh interest was created at the expiration of the second year, and the Company are only bound to pay for the time that they actually occupied. If the plaintiff had by deed demised the

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premises to the defendants as tenants from year to year and they had accepted the tenancy, that might have created an interest which would perhaps have rendered the defendants liable. But there is no such case here; it turns entirely on the validity of the contract, and a corporation cannot, as in the case of an individual, by simply paying rent for a past occupation, create a new implied tenancy. The defendants are only liable for the time they actually occupied, and that has been paid for, and longer. I should observe, that, in the case of *Sanders v. The Guardians of St. Neots Union*, I never meant to decide that a corporation could contract without seal; but I allowed the case to proceed, because I thought the objection was not apparent on the record, and might be raised in arrest of judgment.

PLATT, B.—I am of the same opinion. No doubt an injustice is done to the plaintiff, because the defendants have occupied beyond the term agreed on, and have left without giving any notice to quit; but we must administer the law as we find it. The action is founded on the 14th section of the 11 Geo. 2, c. 19; for, until that statute, rent, which savours of the realty, was not the subject of an action *assumpsit*. That section, however, enables landlords, where the agreement is not by deed, to recover a reasonable satisfaction for the lands "*held or occupied*" by the defendants, "in an action on the case for the use and occupation of what was so held or enjoyed." Therefore, it is clear that the compensation is to be given for the use and occupation of that which is here predicated as being "*held or enjoyed*." The section proceeds "and if, in evidence on the trial of such action, any parol demise or any agreement (not being by deed), whereon a certain rent was served, shall appear, the plaintiff in such action shall nevertheless be nonsuited, but may make use thereof as evidence of the quantum of damages to be recovered."

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that the evil to be remedied was the plaintiff's being nonsuited in an action for rent, by reason of there being a parol demise or agreement in writing not under seal, whereby a certain rent is reserved. I was inclined to think, that, if it could have been made out that the holding continued after the expiration of the first year, by reason of the conduct of the defendants, they might be liable; but the words of the section do not warrant the conclusion, that a holding, without use and occupation, will satisfy the statute. In the case of a private individual, who has agreed to become tenant for a year, and continues in possession after the end of that period, it may be inferred that he commences a new tenancy, which will bind him for two years at the least, unless he determines it by previous notice; but that only arises from the conduct of the parties being evidence of a contract. Then what is the capacity of the persons to whom this evidence is to be applied? If they are incapable of contracting by parol, how can the circumstance of their holding over be evidence of a contract? It seems to me that the cases of *Lamprell v. The Guardians of the Billericay Union* (a), and *Diggle v. The London and Blackwall Railway Company* (b), present an insuperable barrier to the plaintiff's recovering in this action. The private Act does not make any difference, for it applies merely to the case of contracts signed by the directors.

MARTIN, B.—I also agree that there was no evidence to go to the jury for the purpose of fixing the defendants with any liability. Previously to the 11 Geo. 2, c. 19, s. 14, it was the constant course for parties, who sued in assumpsit on an implied promise to pay money in consideration of the plaintiff permitting the defendant to occupy lands, to be nonsuited, in consequence of proof of a parol demise or agreement reserving a fixed rent. To obviate that

(a) 3 Exch. 283.

(b) Ante, Vol. 6, p. 590; 5 Exch. 442.

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injustice, the statute passed, which enabled landlords to recover an equivalent for the rent reserved by a demise, that is, a reasonable satisfaction for the use and occupation; but there must be some occupation by reason of which the defendant becomes liable to pay; and the only effect of proof of a demise at a rent certain is, to fix that amount as the value of the premises. The old doctrine was, that a tenant who held over after his term had expired, was a mere tenant at sufferance; but it is now considered, that, when once he has paid rent, and it has been received by the landlord, it is a question for the jury whether the former does not become, and the latter accept him as, tenant from year to year; and therefore, whether the one is not bound to receive, and the other to give a notice to quit, in order to determine the tenancy. *Jones v. Shears* (a), and a case of *Greville v. De Rutzen*, in this Court some years ago, shew that a party, by holding over does not therefore become a tenant from year to year; but the fact is only evidence for the jury of a new contract, or in other words, the jury may draw an inference from certain facts, that the relation of landlord and tenant was created. In the present case there is an insuperable impediment to the plaintiff's right to recover, as the defendant cannot contract except by deed, or by the means pointed out by the statute; and they have not here rendered themselves liable by either of these modes.

Rule absolute (b).

(a) 4 A. & E. 832.

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 post.

(b) See *Lowe v. The London and*

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IN THE EXCHEQUER CHAMBER.

Easter Term, 1852.

THE YORK AND NORTH MIDLAND RAILWAY COMPANY v. REGINA.

*Jan. 30th;
April 29th.*

THIS was a writ of error from the Court of Queen's Bench, see ante, p. 236.

The writ of error was argued (a) by Sir *Fitzroy Kelly* for the plaintiffs in error, and by *Hugh Hill* for the defendant in error.

JERVIS, C. J., now delivered the judgment of the Court.—This was a writ of error from a judgment of the Court of Queen's Bench on a demurrer to the return to a mandamus commanding the plaintiffs in error, the defendants in the Court below, to purchase lands, and to make a Railway from Market Weighton to Cherry Burton, pursuant to the statute 12 & 13 Vict. c. lx. (The York and North Midland Railway Act of 1849). After argument and time taken to consider in that Court, my Brother *Erle* was of

Mandamus.—The writ stated that the defendants had obtained an Act of Parliament in 1846, which recited that it would be of public advantage if a Railway were formed from York to Beverley by Market Weighton, and that they were willing to execute the same; and that it was enacted that it should be lawful for the defendants to make and maintain the same. That the

Company made and opened to the public this branch from York to Market Weighton. That in 1849 they obtained another Act, to enable them to divert this line between Market Weighton and Cherry Burton, a place three miles from Beverley, which recited that it would be an advantage if such diversion were made, and that the defendants were willing to make such diversion; and that it enacted that it should be lawful for the defendants to make such deviation. That Burton and Leasing were owners of a portion of the land required by the defendants, and that part thereof had been conveyed to the defendants for the purpose of the line as originally authorised. The writ then commanded the defendants to complete the line between Market Weighton and Cherry Burton.

Held, on writ of error reversing the judgment of the Court of Queen's Bench, that the mandamus was bad; that the words of the Act, "it shall be lawful for the Company to make the railway," were permissive only and not imperative; that there was no duty cast upon the Company to make the railway; and that the Company were not bound to complete the line.

That the Company, having exercised some of their powers and made part of the line, were not bound to make the whole of the railway authorised.

Railway Acts cannot be considered as contracts; they give conditional powers, which generally, if acted upon, carry with them duties; but which, if not acted on, are not imperative on the Companies.

If a Company empowered by Act of Parliament to build a bridge over a river were to build a part only, *quære* whether they could not be indicted for a nuisance in obstructing the river, or for not completing the bridge?

(a) Before *Jervis, C. J., Pollock, C. B., Parke, B., Alderson, B., Cresswell, J., Platt, B., Williams, J., Talfourd, J., and Martin, B.*

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opinion that the plaintiffs in error were entitled to judgment: but Lord *Campbell* was of a different opinion, and my Brother *Crompton* concurring with him, the prosecutors had judgment, and a peremptory mandamus was awarded. We have carefully considered this case, and having examined the authorities cited and the statutes are of opinion that my Brother *Erle* was right in the view which he took of it; that the judgment ought to be given for the plaintiffs in error, and not for the prosecutors; and that the judgment of the Court of Queen's Bench must be reversed.

The facts which raise the question may be shortly stated. In 1846, the plaintiffs in error obtained an Act empowering them to make a railway from York through Market Weighton and Cherry Burton to Beverley. They made a portion of that line from York to Market Weighton, but did nothing upon the remainder of it. The powers of their Act expired as to so much of their line as lies between Cherry Burton and Beverley before the mandamus was applied for; but, in 1849, they obtained an Act authorising them to abandon the line between Market Weighton and Cherry Burton, and to substitute in lieu thereof the line now under discussion. There are two prosecutors, one has land on the proposed new line, and a landowner on the line from York to Market Weighton, his land having been taken for the purpose of this Railway. The other has land on the proposed line from Market Weighton to Cherry Burton, and his name is in the schedule to the Act of 1849. Upon these facts several points arise:—First, does the statute of 1849 cast on the plaintiffs in error a duty to make this Railway? Secondly, if it does not, is there, under the circumstances, a contract between the plaintiffs in error and the landowner which can be enforced by mandamus? Thirdly, and failing these propositions, does a work which in its inception was permissive only, become obligatory by part performance? These questions will be found upon examination

to exhaust the subject, and to comprehend every view in which the mandamus can be supported. In substance, do these Acts of Parliament render the Company, if they do not make this railway, liable to an indictment for a misdemeanor, and to actions by the parties aggrieved? For, if they do not, a mandamus will not lie; and thus the question depends entirely upon the construction of the special Act and the statutes incorporated therewith. The Act of 1849 may cast the duty on the plaintiffs in error in one of two ways: it may do so by express words of obligation, or it may do so by words of permission only, if the duty can be clearly collected from the general purview of the whole statute. The words of the 3rd section of the Act of 1849, "it shall be lawful for the said Company to make the said Railway," are permissive only and not imperative; and it is a safe rule of construction to give to the words used by the legislature their natural meaning when absurdity or injustice does not follow from such a construction. Indeed, if there were any doubt upon this subject, other parts of the statute referred to in the argument clearly shew that these words were intended to be permissive only. The distinction is well put by my Brother *Erle* (a): "The Company are permitted at their option to take lands, turn roads, alter streams, and exercise other powers, and these matters are made lawful for them; but they are commanded to make compensation for lands taken, to substitute new roads for those they turn, and to perform other conditions relating to the exercise of their powers; and these matters are required of them." It seems clear, therefore, that the duty is not cast upon the plaintiffs in error by the express words of the statute of 1849; and, indeed, it was not so urged in the argument, nor was it so put by Lord *Campbell* in his judgment in the Court below. But it does not follow, merely because the words of the 3rd section are permissive only, that there is no duty cast upon the plaintiffs in error by the statute,

(a) Ante, p. 244.

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taken altogether, to make this Railway. This point was not relied upon in this case in the Court below; but it was made the distinct ground of a decision in another case in the Court, *Reg. v. The Lancashire and Yorkshire Railway Company* (a), and was much pressed in the argument before us in support of this judgment. It becomes necessary, therefore to examine the statute in its general provisions, and to consider the grounds on which the Court of Queen's Bench proceeded in the case of *Reg. v. The Lancashire and Yorkshire Railway Company*. We agree with Lord Campbell, that the portion of the line between Market Weighton and Cherry Burton, to which the mandamus applies, is not to be considered as a separate railway, or even as a separate branch of a railway, but is to be treated as if, in its present direction, it had been included in the Act of 1846. The Acts then, taken together, in substance recite that it will be an advantage to the public if a railway is made from York to Beverley through Market Weighton and Cherry Burton according to certain plans and sections, deposited as required by the practice of Parliament, and referred to in the statute; and that the plaintiffs in error are willing to make that railway. On this basis the whole provisions are founded. It has been proved that the work will be advantageous to the public. It is assumed it will be profitable to the Company, and that, therefore, they will willingly undertake it. Accordingly, the Company are empowered to make this line; if they do make it, they may take land; but if they do take land they must make compensation. If necessary, they may turn roads or divert streams; but if they do, they must make new roads and new channels for the streams they alter. Similar provisions pervade the whole statute; and, throughout, the command waits upon the authority, and the distinction between "may" and "must" is clearly defined. But as it is manifest that such general powers must stop improvements, and may, to a certain ex-

(a) Ante, p. 266; 1 E. & B. 228.

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tent, be injurious to landowners on the line, the compulsory power to take land is limited to three years, and the time for making the railway to five, after which the powers granted to the Company cease, except as to so much of the line as shall have been completed; and the land, if taken by the Company, reverts on certain terms to the original proprietors. An argument might have been founded on the terms in which the latter provision is contained. By the 10th section of the Act of 1849, it is enacted, that the railway shall be completed within five years from the passing of the Act. That section was not referred to in the argument for this purpose; but it might be said that these words were compulsory, and impose a duty upon the Company to make the line. The context of the section, however, when examined, shews that such is not the meaning of it. If not completed within five years, the powers of the Act are to expire, except as to so much of such railway as shall have been completed. If the section were intended to be obligatory, it would not contain that exception which contemplates that the line may be made in part. It is inconsistent to suppose that the legislature would say to the Company in the same section, You may complete a part only if you can in five years, and then as to that part the powers of the Act shall continue; but you must complete the entire line in that time. Upon the whole, therefore, we find no duty cast upon the Company to make this railway in any part of this Act of Parliament. On the contrary, the legislature seems to contemplate the possibility of the railway being made in part, or being totally abandoned. In the latter case, the powers expire in three or five years; in the former, the statutes remain in force as to so much of the Railway as shall have been completed within that time, and expire as to the residue. This provision is inconsistent with the intention to compel the Company to make the entire line as the consideration for the powers granted by the Act. But it is said, that a

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Railway Act is a contract on the part of the Company to make the line; and that the public is a party to that contract, and will be aggrieved if the contract may be repudiated by the Company at any time before it is acted upon. Though commonly so spoken of, Railway Acts, in our opinion, are not contracts, and cannot be construed as such. They are what they purport to be, and no more. They give conditional powers, which, if acted upon, carry with them duties; but which, if not acted upon, are not, either in their nature or by express words, imperative on the Companies to which they are granted. Courts of justice ought not to depart from the plain meaning of the words used in Acts of Parliament. When they do, they make, but do not construe the laws. If it had been so intended, the statute should have required the Company to make the line in express terms. Indeed, some Railway Acts are framed upon that principle; and to say that there is no difference between words of requirement and words of authority when found in such Acts, is simply to affirm that the legislature does not know the meaning of the commonest expressions. But, if we were at liberty to speculate upon the intentions of the legislature when the words are clear and to construe an Act of Parliament by our own notions of what ought to have been enacted upon the subject,—if sitting in a Court of justice, we could make laws,—much might be said in favour of the course which, in our opinion, is taken by the legislature on such subjects. Assuming that the line, if made, would be profitable to the public, that benefit may be delayed for five years, during which time competition is suspended. On the other hand, if the line would pay, it probably will be proceeded with, unless the Company having the power is incompetent to the task. Individual landowners may be benefited by the expenditure of capital in their neighbourhood, without looking to the ultimate result; but it is not for the public interest that the work should be undertaken by an incompetent

Company, nor that it should be begun, if, when made, it would not be remunerative. By leaving the exercise of the powers to the option of the Company, the legislature adopts the safest check on abuse in either of those respects, namely, self-interest. It seems to us, therefore, that these statutes do not cast upon the plaintiffs in error this duty, either by express words or by implication; that we ought to adhere to the plain meaning of the words used by the legislature, which are permissive only; and that there is no reason, in policy or otherwise, why we should endeavour to pervert them from their natural meaning. But it is said that the landowners are in a better situation than the public at large, and that the privilege to take their lands is the consideration which binds the Company to complete the Railway; that, during the currency of the three years, they are deprived of their full rights of ownership, and, if not to be compensated by the construction of the railway, they would in many cases suffer a loss, because, whilst a compulsory power of purchase subsists, they are prevented from alienating their lands or houses described in the books of reference, and from applying them to any purposes inconsistent with the claim that may be made to them by the Railway Company. In truth, they are not prevented from so doing at any time before the notice to take their lands is given, if they act *bonâ fide* in the meantime: the notice to take their lands being the inception of their contract between the landowners and the Company. But if this complaint were better founded, it does not follow, because certain landowners are subjected to temporary inconvenience for the performance of a public good, that, therefore, the Company are bound to make the whole railway. If it were a contract between the landowners and the Company, it would not be just that one should be bound and the other free. But, to assert that there is a contract between the landowners and the Company is to beg the whole question; for, on this

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part of the case the question is, whether there is such a contract? As a matter of fact, we know that in many cases no such actual contract exists. Some few proprietors may desire and promote the railway, but many others oppose it, either from disinclination to the project or with a view to make better terms. With the dissent there is no contract, unless it be found in the statute; and to the statute, therefore, we must look, to see what is the obligation that is cast upon the Company in respect of the landowners upon the line. As in the former case, the words upon this subject are permissive only. The Company may take land; if they do, they must make full compensation: and in that state of things, if there be a bargain between the parties, what is the bargain? The Company say, in the language of the statute, that the bargain is that they shall make full compensation for the land taken and no more; the prosecutors say, that the consideration to be paid for the land is the full compensation mentioned in the Act, and also, the further consideration of the construction of the entire line of railway from York to Beverley. But if this is the price which the prosecutors are to have, each landowner is entitled to the same value; and yet by this mandamus, the other proprietors on the line from Marken Weighton to Cherry Burton, who perhaps are hostile to the application, are constrained to sell their lands for an inadequate consideration, viz. the full compensation and a part only of the line of railway, to which, by the hypothesis they were entitled by the original bargain. If this were the true meaning of the statute, it would indeed be unjust more so than the imposition of these temporary inconveniences to which it is said the landowners may be subject and to which we have already referred. But that this is not the true meaning is clear from the words of the statute which are permissive, and only impose the duty of making full compensation to each landowner, as the option of taking the land of each is exercised; and, further, from the

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section to which we have already referred, which contemplates the total abandonment of the line or a part performance of it, and makes provision for the return of the land to the original proprietors in certain cases. Upon this part of the case the authority of Lord *Eldon*, in *Blakemore v. The Glamorganshire Canal Company* (a), was much pressed upon the Court. Speaking of contracts for private undertakings, he says: "When I look upon these Acts of Parliament I regard them all in the light of contracts made by the legislature on behalf of every person interested in anything to be done under them; and I have no hesitation in asserting, that, unless that principle be applied in construing statutes of this description, they become instruments of greater oppression than anything in the whole system of administration under our constitution. Such Acts of Parliament have now become extremely numerous; and from their number and operation they so much affect individuals, that I apprehend those who come for them to Parliament do, in effect, undertake that they shall do and submit to whatever the legislature empowers and compels them to do, and that they shall do nothing else—that they shall do and forbear all that they are thereby required to do and forbear—as well with reference to the interests of the public as with regard to the interests of individuals." There is nothing in that language to which it is necessary to make the least exception; indeed it is nothing more than an illustration of the obligatory nature of a duty imposed by Acts of Parliament which do impose a duty with reference to other persons. In that case the statute had secured to Mr. Blakemore the surplus water, and had commanded the Company to do certain things that he might enjoy it. In discussing whether Mr. Blakemore's right under the statute was affected by his right before the statute, his Lordship might well say, he considered the statute, the origin of Mr. Blakemore's right, in

(a) 1 My. & K. 162.

this case; but if they mean that words of permission when used in the class of cases under consideration receive a construction different from their ordinary meaning, because, if construed otherwise, they might work injustice, with great respect for his high authority we dissent from that proposition. We agree with my Brother Gifford, who, in *Lee v. Milner* (a), said "These Acts of Parliament have been called parliamentary bargains made with each of the landowners. Perhaps, more correctly, they ought to be treated as conditional powers given by Parliament to take the lands of the different proprietors whose estates the works are to proceed. Each landowner therefore, has a right to have the powers strictly and literally carried into effect as regards his own land, but he has the right also to require that no variation shall be made to his prejudice in the carrying into effect the bargain between the undertakers and any one else." This, I conceive to be the real view taken of the law by Lord Eldon, in the case of *Blakemore v. The Glamorgan Canal Company*."

There remains but one further view of the case to be considered, and that we have partly disposed of in our observations we have already made: but inasmuch as *Campbell* proceeded on this ground only in the Court of Exchequer, although it was not much relied upon before us in the House of Lords, we have out of respect to his high authority

pany, having exercised some of their powers and made part of their line, are bound to make the whole railway authorised by their statutes. It is unnecessary here to determine the abstract proposition that a work, which, before it is begun, is permissive, is, after it is begun, obligatory. We desire not to be understood as assenting to the proposition of my Brother *Erle*, that many cases may occur where the exercise of some of the compulsory powers may create a duty to be enforced by mandamus; and on the other hand, we do not say that such may not be the law. If a Company, empowered by Act of Parliament to build a bridge over the Thames, were to build one arch only, it would be well deserving of consideration whether they could not be indicted for a nuisance in obstructing the river, or for the nonperformance of a duty in not completing the bridge. It is sufficient to say, that in this case there are no circumstances to raise such a duty, if such a duty can be created by the acts of the party himself. The plaintiffs in error have made the principal portion of their line, and they have abandoned the residue, from no corrupt motive, but because Beverley has already sufficient railway communication, and because the residue of the line passes through a country thinly populated, and, if made, would not be remunerative. But it is said that the Railway Companies are not in the situation of purchasers of land, with liberty to convert it to any purpose or to allow it to lie waste; that they are allowed to purchase it only for a railway, and, having acquired it under the compulsory powers of the Act, there must be an obligation upon the Company to apply the land to that and to no other purpose. Subject to the qualification in the Act, this is undoubtedly true. Having acquired the lands of particular landowners the Company could not retain them by merely laying rails on the land so taken; and we agree it never was intended that the landowner should be left with a high mound or deep cutting running through his estate and leading nei-

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authority is very striking, when we remember how many Acts have passed in *pari materiâ*, not only for railways but also for bridges and turnpike roads. Notwithstanding the numerous occasions on which such proceedings might have been taken, and the manifest interest of landowners to enforce their rights, no instance can be found of an indictment for disobeying such a statute, or of a mandamus for the purpose of enforcing it. If correctly reported, Lord *Mansfield* determined this point in *Rex v. The Proprietors of The Birmingham Canal Navigation* (a); for he says, "The Act imports only an authority to the proprietors, not a command. They may desert or suspend the whole work, and *à fortiori* any part of it." On the other side, the language of Lord *Eldon*, in *Blakemore v. The Glamorganshire Canal Company* (b), is referred to as an authority for this mandamus. In our opinion it does not bear that construction, although it appears that the Court of Queen's Bench took a different view of that authority in the case of *Reg. v. The Eastern Counties Railway Company* (c), and was inclined to act upon it and award a mandamus. The writ was subsequently withheld in that case on another ground; but Lord *Denman* seems to have been of opinion that on a fit occasion a mandamus ought to go. That, and the recent cases in the Court of Queen's Bench now under discussion, are the only cases which bear upon the subject. We feel that Lord *Denman* and Lord *Campbell* are high authorities upon this or any other matter, and are both equally entitled to the respect of this Court; but we are bound to pronounce our own judgment, and after the most careful consideration are of opinion that that judgment ought to be for the plaintiffs in error. The result is, that the judgment of the Court below must be reversed.

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Judgment reversed.

(a) 2 Wm. Bl. 708. (b) 1 My. & K. 154. (c) 10 Ad. & E. 531.

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COURT OF EXCHEQUER.

*Easter Term, 1852.**May 1st.*

LANDMAN v. ENTWISTLE.

The plaintiff, an engineer, was employed by the provisional committee of a projected Railway Company, and, at a meeting of that committee, the plaintiff being present, a resolution was passed "That the provisional committee disclaim the intention of taking on themselves any personal responsibility as regards the expenses incurred or to be incurred in or about the Company, and that no such responsibility shall attach to them."

ASSUMPSIT for work and labour.

Plea, non assumpsit.

The cause was tried before *Pollock*, C. B., at the minster Sittings after Hilary Term, 1852. The action brought to recover the sum of 616*l.* by the plaintiff, engineer and surveyor, for work done in that character having been employed by the provisional committee of the Kentish Railway Company, of which the defendant was one. The plaintiff commenced making the plans, &c.; and at a meeting of the provisional committee on the 12th of August, 1844, to which the defendant was present and at which the plaintiff was present, it was resolved "That the provisional committee disclaim the intention of taking on themselves any personal responsibility as regards the expenses incurred or to be incurred in or about the Company; and that no such responsibility shall attach to them."—"That it be a recommendation to the committee of management to endeavour to secure the services of J. L. and Col. L. (the plaintiff), it being clearly understood that neither of those gentlemen shall have any personal claim against any member of the provisional committee." Subsequently, at another meeting, the plaintiff being also present, it was resolved that Col. L. be requested to forward the survey, "Col. L. (the plaintiff) stating that he would make good for his personal services until there should be sufficient funds of the Company to meet and for which he might be entitled to make." In answer to a letter from the secretary the plaintiff wrote, "I never understood, that, unless the project were successful, the engineers were to abandon the project, but I did understand that the individuals comprising the committee were not to be held personally liable." Afterwards, at a meeting of the committee, it was resolved, "that the committee bind themselves to be answerable to the extent of 1000*l.*, to be applied to engineering and surveying purposes." Deposits to the amount of 4168*l.* were received by the committee, and returned to the shareholders, the scheme having been abandoned in consequence of an agreement with another Company. In an action by the plaintiff against one of the provisional committee for services performed in promoting the undertaking:—*Held*, that he was not liable, though having undertaken to do the work not upon a contract with the provisional committee, but upon the chance of the scheme succeeding and there being funds available for the payment of his claim, as there were not.

to them:" and, "That it be a recommendation to the committee of management to endeavour to secure the valuable services of J. Locke, Esq., the eminent engineer, in addition to those of Colonel Landman, the original projector of the railway, it being clearly understood that neither of those gentlemen shall have any personal claim against any member of the provisional committee."

The solicitors of the Company, on the 9th of October, 1844, wrote to the plaintiff, inquiring whether the survey of the line was not included in his "engagement to the committee not to make any charge unless the project succeeded;" who answered, on the 11th of October, "I never understood, that, unless the project were successful, the engineers were to abandon all claim; but I did understand that the individuals comprising the committee were not to be held personally liable. I am perfectly ready to continue to devote my time and attention to the perfecting of the survey and getting up of the parliamentary documents, without making any charge for the same until sufficient funds may have been collected."

On the 7th of October, the plaintiff wrote to the secretary of the Company urging the propriety of calling a meeting of the committee, in order that they might adopt the necessary measures for providing the funds indispensably required for carrying on the final surveys and completing the parliamentary documents; and, on the 17th of October, at a meeting of the committee of management, the plaintiff being present, it was resolved "That Messrs. Lake & Co. be requested to forward the survey in such manner as may be found available; Col. Landman (the plaintiff) stating that he would render every assistance in his power, and that he would make no claim for his personal services or for those of his assistant, Mr. Pinhorn, until there should be sufficient funds of the Company to meet any demand he might be entitled to make."

At another meeting of the committee of management

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on the 29th of October, 1844, the following resolution was carried: "That, it appearing to the committee that it is absolutely necessary to provide a fund, in order that the surveys of the line may be immediately proceeded with, it was (on the motion of Mr. Entwistle)—Resolved, that the committee bind themselves to be answerable to the extent of 1000*l.*, to be applied to engineering and surveying purposes."

At a meeting of the provisional committee on the 28th of November, 1844, at which the defendant was present, it was resolved, "That B. Greene, J. Blyth, John Entwistle (the defendant), the trustees for this Company, be a committee for determining and settling the liabilities of this Company, and for receiving from the South Eastern Railway Company, under the arrangement entered into with them, the money requisite for discharging such liabilities."

The solicitors of the Company, on the 18th of November, wrote to the plaintiff as follows:—"We are desired by the committee of management to inform you that they have made arrangements, by means of which their projected line of railways through North Kent to Canterbury will be executed by the South Eastern Railway Company, and to request that you will furnish them, as early as possible, with a statement of the expenses incurred on the authority of the committee in reference to the Kentish Railway."

The deposits on shares amounted to 4168*l.*, but they were returned to the subscribers, the scheme having been abandoned in pursuance of the arrangement entered into with the South Eastern Railway Company. On the part of the defendant it was contended, that he was not liable, the contract being, as was contended, that the plaintiff should be paid out of the profits of the undertaking. The learned Judge, being of that opinion, directed a nonsuit, reserving leave for the plaintiff to move to enter a verdict for him.

A rule nisi having been obtained,

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The *Attorney-General* (with whom were *Hoggins* and *Mythies*) shewed cause (a).—The plaintiff consented to act the terms of the resolution of the 12th of August, 1844; has, therefore, no remedy against the individual members of the provisional committee. The deposits were not fund out of which the plaintiff was to be paid; but they were intended to provide for petty cash expenses only.—as cited *Ashpitel v. Sercombe* (b) and *Higgins v. Hop-* (c). There is no fund available to satisfy the plaintiff's claim.

The Court then called on

Sir A. Cockburn, Bramwell, and Wilkinson in support of the rule.—The resolution of the 12th of August is explained by that of the 17th of October, in which the plaintiff consents that he will make no claim “until there should be sufficient funds of the Company to meet any demand he might be entitled to make.” It never was intended that the plaintiff should release the committee from all obligation, but only that they should not be personally responsible if there were funds to satisfy his claim. The meaning of the parties was, that the provisional committee could not be liable at all events, but that, as soon as sufficient funds were collected, the plaintiff should be entitled to enforce his claim.

PARKE, B.—I am of opinion that this rule ought to be discharged. It is clear to me that the plaintiff undertook to do the work, not upon a contract personally binding the provisional committee, but looking to the chance of the scheme succeeding, and of there being funds availa-

(a) Before *Pollock*, C. B., *Parke*, 147.

Platt, B., and *Martin*, B.

(c) Ante, Vol. 6, p. 75; 3 Exch.

(b) Ante, Vol. 6, p. 224; 5 Exch. 163.

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ble for the payment of his claim. The plaintiff's letter, of the 11th of October, shews that there was no contract on the part of the provisional committee that he should be paid at all events. It is not an uncommon case for the contract to be, that the party should look to the funds of the Company, and not to the responsibility of the individuals.

PLATT, B.—I am of the same opinion. This action cannot be maintained, unless there was a personal responsibility on the part of the defendant to pay the plaintiff. Now, it is clear, that, by the resolution of the 12th of August, the provisional committee distinctly repudiate any personal liability; and it appears from the resolution of the 17th of October, that the plaintiff agreed to make no claim for his personal services “until there should be sufficient funds of the Company to meet any demand he might be entitled to make.” That must mean sufficient funds of that description which the committee could properly apply in satisfaction of the plaintiff's claim. The sum of 4168*l.*, consisting of deposits, was not a fund of that description; for, on the abandonment of the scheme, all the depositors were entitled to call for repayment of their deposits, the consideration upon which their duty to pay was founded being at an end. That sum, therefore, was not available in satisfaction of the plaintiff's demand, and there were no funds out of which he was entitled to be paid.

MARTIN, B.—This case has been put to us much in the same way that a counsel puts a case to a jury,—that the plaintiff has done the work, and that he is entitled to be paid for it. But the true contract between the parties must be looked at, for the purpose of ascertaining with whom the liability rests. Now, in this case, was there an obligation on the part of the provisional committee to go on with the scheme? There certainly was not. They were

at liberty in that respect to act as they pleased, and the engineer had no right to compel them to go on. He took the chance of payment provided the scheme succeeded, in which case he would, no doubt, have been paid out of the profits.

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POLLOCK, C. B., concurred.

Rule discharged.

EXCHEQUER CHAMBER.

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THE declaration stated, that, by an indenture of the 10th of March, 1846, made between the plaintiffs and the Lon-
 The plaintiffs having obtained an Act empowering them to make a railway connecting the London and Birmingham Railway with the Great Western Railway, agreed with the latter Company that they might carry their line across the plaintiffs' on a level, the soil of the land belonging to the plaintiffs; and the Great Western Railway Company covenanted with the plaintiffs to construct a railway station at the point of junction for the purpose of transferring passengers and goods from the one railway to the other, and also to stop their trains for the purpose of meeting corresponding trains of the plaintiffs. This agreement was subsequently sanctioned by Act of Parliament. Afterwards the defendants, having previously agreed with the plaintiffs to take a lease of their railway, obtained an Act of Parliament (the 8 & 9 Vict. c. clvi) to enable them to take that lease. It recited, that it had been found that the defendants' railway could not be worked as a separate and independent undertaking with advantage to the proprietors thereof; but that the same might be advantageously worked and used in connection with the London and Birmingham and Great Western Railways, or either of them, by either of the Companies to whom those railways belong. Power was given to the plaintiffs to lease to the London and Birmingham Railway Company their railway, stations, &c., and all their rights, powers, and privileges in relation thereto; and it was declared that it should be lawful for the London and Birmingham Railway Company to accept such lease, and to use, exercise, and enjoy all such powers, rights, and privileges as aforesaid. Pursuant to this Act, the lease from the plaintiffs to the defendants was executed, by which the plaintiffs leased to the defendants all the stations, &c., and rates and tolls, together with all the rights, powers, and privileges of the plaintiffs in relation thereto; the defendants agreeing, half yearly, to carry to the credit of the plaintiffs such a sum of money as should be equivalent to one-fourth of the gross sums received by the defendants during the period of six calendar months next preceding, in respect of passengers, goods, and other things carried on the line; and the defendants covenanted, that they would, "at their own expense, during the continuance of the lease, *efficiently work* and repair the railway and works demised, and indemnify the plaintiffs against all liabilities, loss, charges, and expenses, claims and demands, whether incurred or sustained in consequence of any want of

thereto, for 999 years; that it was agreed, that the continuance of the lease, the London and Ham Railway Company should, within twenty- after the 30th of June and the 31st of December year, carry to the credit of the plaintiffs such a sum as should be equivalent to one-fourth part of sums received by the London and Birmingham Company during the period of six calendar months immediately preceding the 30th of June and of December, in respect of passengers, goods, and things carried or landed on the plaintiffs' railway lands or appurtenances thereto belonging, and a sum of money as should be equivalent to half

repair, or in consequence of not working, or in any manner connected with the use of the same railway and works;" but the plaintiffs were to have no control whatever over the management of the line or works. In an action on this agreement for not efficiently working the said railway:—*Held*, First, *Platt*, B., and *Martin*, B., dissenting, that the London and Birmingham Railway Company were not bound to work the line for passenger traffic at all; that as much gross profit could be obtained by efficiently working the railway for goods only, or for both passengers and goods, as working in any one of these modes would be sufficient.

Secondly, that they were not bound to carry passengers, even if passengers presented themselves; but if by working the railway efficiently for goods it produced as much gross profit as working it for passengers.

Thirdly, that, under the statute authorising the lease, and the lease itself, the defendants had power to compel the Great Western Railway Company to stop trains on their railway, and their covenant contained in their agreement.

Fourthly, that the defendants would not be bound necessarily to work the line in connection with trains on the Great Western line; nor,

Fifthly, to work the line in connection with the trains on their own line; nor,

Sixthly, to stop their own trains where necessary for the purpose of working in connection with the plaintiffs' line if the jury should find that they could work the line efficiently

profits arising from the rates, tolls, and duties to be received for the use of the same from persons providing their own locomotive or other moving power; and that it was further agreed, that the rates and tolls payable in respect of passengers and of parcels, and small packages of goods or other things conveyed upon the plaintiffs' railway, should, as between the Companies parties thereto, be credited and accounted for by the London and Birmingham Railway Company in respect of passengers, parcels, and small packages, at the rate of fifty per cent. more than the rates and tolls charged in respect of passengers, parcels, and small packages carried upon the main line of the London and Birmingham Railway Company for similar distances; and in respect of goods and other things, at the rate of fifty per cent. per ton per mile more than the rates and tolls charged in respect of goods and other things carried upon the main line of the London and Birmingham Railway Company for similar distances, whether such increased tolls should or should not be charged by the London and Birmingham Railway Company in respect of the said passengers, parcels, small packages, goods, and other things conveyed on or along the plaintiffs' railway. That it was thereby further agreed, that the London and Birmingham Railway Company should, at their own expense, during the continuance of the said lease, *efficiently work and repair the railway and works* thereby demised, and indemnify the plaintiffs against all liabilities, loss, charges, and expenses, claims and demands, whether incurred and sustained in consequence of any want of repair, or in consequence of not working or in any manner connected with the working of the same railway and works; but that the plaintiffs were to have no control whatever over the working or management by the London and Birmingham Railway Company of the plaintiffs' railway or works, &c.

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It then alleged, that the London and Birmingham Railway Company were afterwards by Act of Parliament dissolved, and incorporated under the name of the London and North Western Railway Company. That the London and Birmingham Railway Company entered on the demised premises, and continued in possession of them until its dissolution; and that the defendants were possessors thereof ever since.—Breach: Sixthly, that the London and Birmingham Railway Company before its dissolution and the defendants since, “did not nor would at their own expense *efficiently work the said railway and works, so as the aforesaid demised, or any of them*; and that, from the time of the making of the indenture, the said London and Birmingham Railway Company before its dissolution and the said defendants ever since, had refused and neglected to do so; and thereby the plaintiffs had been damaged and sustained loss by reason of there not being carried to their credit divers sums and proportions of receipts or profits, to wit, one-fourth part of gross receipts, and half of such net profits; and against which loss or any part thereof, the London and Birmingham Railway Company, or the defendants, had never indemnified the plaintiffs.”

The defendants set out the indenture on oyer, and pleaded, that, from the time of the dissolution of the London and Birmingham Railway Company, they did, at their own expense, efficiently work the said railway and work according to the covenant. On which issue was joined.

The cause was tried, first, before *Jervis*, C. J., at the London Sittings after Hilary Term, 1851, when the plaintiffs had a verdict; but that verdict was subsequently set aside on the ground of misdirection (a). The cause was again tried before *Jervis*, C. J., at the London Sittings of

(a) See 11 C. B. 254.

ter Hilary Term, 1852; when it was proved, that, in 1836, the plaintiffs obtained their Act of incorporation, the 6 Will. 4, c. lxxix., authorising them to make a railway from the basin of the Kensington Canal, at Kensington, to join the London and Birmingham and Great Western Railways at or near Harlesden Green, in the county of Middlesex.

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That the Great Western Railway Company afterwards purposing to extend their line to Paddington, which would necessarily cross the plaintiffs' intended line nearly at right angles, entered into an agreement with the plaintiffs (who were then called "The Birmingham, Bristol, and Thames Junction Railway Company,") by a deed of the 4th of February, 1837, which, after reciting that the soil of the piece of land, at the proposed point of intersection, had been conveyed to the plaintiffs by the Bishop of London, contained covenants:—That the ownership of the soil should remain vested in the plaintiffs, subject to the powers granted to the Great Western Railway Company; that it should be lawful for the Great Western Railway Company to make and carry their railway across the plaintiffs' proposed line at the specified point, and to pass along the piece of land and such portion of the railway at their pleasure; and that the crossing of the two lines should be on a level, unless otherwise agreed. Fourthly, that the Great Western Railway Company should construct and maintain a station at the point of junction for the purpose of transferring passengers and goods to and from the plaintiffs' railway respectively. Fifthly, that within one week after the plaintiffs should have given notice to the Great Western Railway Company of their line being completed, and of their intention to open the same for public use, the Great Western Railway Company should deliver to the plaintiffs a notice, stating the periods at which their regular trains, both going and coming, were intended to arrive at the station agreed to be made at the

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point of intersection. Sixthly, that, after the receipt by the plaintiffs of such notice, they should give notice to the Great Western Railway Company in writing, stating how many and which of their trains, both to and from London should meet those of the Great Western Railway Company at the station aforesaid. Seventhly, that the Great Western Railway Company should stop such of their train as the plaintiffs should have declared in the manner aforesaid their intention of meeting by corresponding train at the station, for the purpose of taking up and setting down such passengers as might require to be transferred to and from the trains of the plaintiffs, and might be respectively ready for the purpose; and, in default thereof the Great Western Railway Company should pay a penalty of 20*l.* for each omission: provided always, that, in case no passengers or goods should be in readiness at the said station to be received by the trains of the Great Western Railway Company, or be required to be transferred to the Great Western Railway, then it should not be obligatory on the Great Western Railway Company to stop the train in manner aforesaid. Eighthly, that the plaintiffs should cause their trains to meet those of the Great Western Railway Company in every instance, wherever they might have given notice of their intention so to do, and at the place mentioned in such notices, and in default thereof should pay to the said Great Western Railway Company the sum of 10*l.* for every omission. Ninthly, that the Great Western Railway Company should keep a barrier across the plaintiffs' line during the passage of trains on the Great Western line.

The

proved that they had made the evidence an agreement between London and Birmingham Railway, 1845, for a lease of the line, and agreed that the Western Railway should be from time to time,

the cost, charges, and risk of the London and Birmingham Railway Company, exercise and put in force the powers of their Acts of Parliament, when and in such manner as the London and Birmingham Railway Company should require for any purpose or purposes connected with, or arising out of, or required for, giving effect to those presents. That the London and Birmingham Railway Company should, at their own expense, during such times as they should be tenants or lessees or in the possession of the West London Railway and other works agreed to be leased as aforesaid, or in the receipt of the rates and tolls arising therefrom, or from any part thereof, efficiently work and repair the same railway and works. That the London and Birmingham Railway Company should indemnify the West London Railway Company against all liabilities, losses, charges, and expenses, claims and demands, to be incurred or sustained in consequence of any want of repair, or in consequence of not working, or in any manner connected with the working of the same railway and works; but that the West London Railway Company should have no control whatever over the working or management, by the London and Birmingham Railway Company, of the West London railway or works, except and subject nevertheless to the stipulation contained in the last preceding article.

There was also given in evidence the indenture of 10th of March, 1846, being the indenture declared on by the plaintiffs. It was also proved, that the said West London Railway joined the London and North Western Railway at Harlesden Green, about five miles and three quarters of another mile from London; that it was about three miles in length, and was laid down with a single line of rails only, though a double line of rails might have been laid down, and there was sufficient land for that purpose included in the lease to the London and Birmingham Railway Company; that, before the said demise to the defend-

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ants, the plaintiffs worked their railway, both for passengers traffic and goods traffic, and carried passengers and goods, though to a very trifling extent; and that the plaintiffs had only two locomotive engines, two carriages, and five or six waggons; and that the whole receipts were about 2*l.* per week; and that, before the making of the said first-mentioned agreement, the said West London Railway had been worked by the plaintiffs at a great loss, and that they had ceased to work the same; and that at the time of making the said indenture of the 10th of March, 1846 and thence to the commencement of this action, there were four stations belonging to the said line, and booking office and accommodation for booking and receiving both passengers and goods.

And the plaintiffs gave evidence to prove, that, in the neighbourhood of the said stations, a large population resided; and that many of them would have become passengers upon the line, if passenger trains had been run through and worked in connection with trains on the said London and Birmingham, and London and North Western and Great Western Railways; and that large quantities of goods might, after the making of the said lease, have been carried on the said West London line, if the same had been worked in connection with trains on the said other railways, or some or one of them; and that passenger trains or carriages were not run along the said West London Railway, nor were the stations or booking offices of the said railway kept open for the purpose of receiving passengers to be conveyed on the said line; nor did the defendant advertise or in any way make known to the public that passengers might travel or be carried on the said line.

The Lord Chief Justice, in conformity with the opinion of the Court of Common Pleas, directed the jury on the issue raised on the sixth breach:—First, that, under the said covenant on which the said sixth breach was assigned, and in order to perform the same, the said London and Birmingham

ham Railway Company and the defendants respectively were not bound to work the said West London line, nor was it necessary that the same should be worked for passenger traffic as well as for goods traffic. Secondly, that it was not necessary that the London and Birmingham Railway Company and the defendants should work the West London Railway and works, or that the same should be worked for passenger traffic as well as for goods traffic, if such traffic presented itself. Thirdly, that the said agreement of the 4th of February, 1837, was not transferred to the London and Birmingham Railway Company or the defendants, or made binding between them and the Great Western Railway Company; and that, therefore, the said London and Birmingham Railway Company and the defendants respectively had no power to compel the Great Western Railway Company to stop trains on the line of the Great Western Railway. Fourthly, that the said London and Birmingham Railway Company and the defendants respectively were not bound to work the West London line, and that it was not necessary that the same should be worked, in connection with the trains of the Great Western Railway. Fifthly, that the said London and Birmingham Railway Company and the defendants respectively were not bound to compel the Great Western Railway Company to stop trains on the Great Western Railway, where necessary for the purpose of working, in connection with the West London line. Sixthly, that the said London and Birmingham Railway Company and the defendants respectively were not bound to work the West London line, and that it was not necessary that the same should be worked, in connection with trains on the line of the said London and Birmingham Railway Company and the defendants respectively. Seventhly, that the said London and Birmingham Railway Company and the defendants respectively were not bound to stop the trains of the said London and Birmingham Railway Company and the defendants on the

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line of the London and Birmingham and London and North Western Railways respectively, when necessary for that purpose. And lastly, that the said London and Birmingham Railway Company and the defendants respectively must be treated by the jury, for the purpose of considering their liability under the said covenant, as if they were lessees of separate and independent lines, having no control over the Great Western, and London and Birmingham, and London and North Western Railways, or any of them.

On this ruling the defendants had a verdict, the plaintiffs tendering a bill of exceptions; which was now argued (a) by

Byles (with whom was *Aspland*) for the plaintiffs.—First, the defendants were bound to exercise the usual and ordinary means of securing traffic, and were therefore bound to work for passenger traffic. Such traffic was to be had. The lessors and lessees were carriers of passengers and goods, and must have contemplated a similar traffic. If two tradesmen were to agree to carry on business, it would be assumed to be *the* business that they then carried on. Besides, the 6 Will. 4, c. lxxix. provides for passenger traffic: (Sects. 150, 152, 153). The agreement with the Great Western Railway Company also provides for the exchange of passengers from one line to the other. So the covenant to work effectually must mean as they were previously in the habit of working: Bacon's Maxims, reg. 10, post, p. 490. [*Martin*, B.—Suppose the London and Birmingham Railway Company, when it existed, had taken the Grand Junction line, could any one doubt that they would be bound, under similar circumstances, to carry Liverpool passengers on from Birmingham?]

(a) Before *Parke*, B., *Cole-ridge*, J., *Wightman*, J., *Erle*, J., *Platt*, B., *Martin*, B., and *Crompton*, J.

ly, the defendants had power to compel the Great Railway Company to stop trains at the point of

The fee simple of the crossing belongs to the and the Great Western have only an easement which they cannot retain discharged from their land. They are rights which run with the land. The Parliament sanction that right: 3 & 4 Vict. c. cv. 36 and 37 (a), 8 & 9 Vict. c. clvi.; and the effect

. 34 recites a portion of an agreement dated 4th Feb., 1853, between the Great Western Railway Company and the Birmingham, Bristol, and Thames Junction Railway Company, and contains provisions with reference to one line crossing the

“And whereas, by the said agreement it is provided among other things, that the Great Western Railway shall, and they are authorised to, maintain in repair the lines of and other works at the crossing of the said two and it is essential for the use and for the security of using the said two or either of them, that the Great Western Railway should, after the completion of the opening for use of the Birmingham, Bristol, and Thames Junction Railway, have the exclusive management and control of the said railway at the point of crossing, and of the rails, and other apparatus and machinery connected thereinbefore described,

subject to the ownership of the soil of the land at the point of crossing aforesaid being vested, as in this Act mentioned, in the said last-mentioned Railway Company, and subject to the performance by the said two Companies of the several provisions in the said agreement contained, so far as the same may remain unmodified by any future agreement in writing between the said two Companies, or any Act of the legislature, Be it enacted, that when the said Birmingham, Bristol, and Thames Junction Railway shall have been completed, the management and control of the lines of the said two railways at the point of intersection thereof, and of the rails, switches, and other apparatus and machinery connected with such lines at the said point of intersection as aforesaid, which have been or may be hereafter constructed and made, and which by the said agreement are required to be maintained and kept in repair by the said Great Western Railway Company, shall remain vested in the said Great Western Railway Company, but subject to the per-

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of the lease and the statutes is to make the defendants assignees of the plaintiffs' right to stop the Great Western

formance by the said two Companies respectively of the several stipulations in the said recited agreement of the 4th Feb. 1837, contained, or to such other stipulations or arrangements as may be hereafter agreed on in writing by the said two Companies; and in default by either of the said two Companies in the performance of any of the said stipulations which may be necessary for the protection of the public using the said two railways, or either of them, the Company so making default shall, for each and every offence, forfeit and pay to the other Company 10*l.*, to be recovered before any magistrate for the Metropolitan District of Police, or before any two justices of the county of Middlesex in petty sessions assembled; and all such penalties shall be recoverable as is provided by the said recited Act in regard to any penalties thereby imposed: Provided always, that if, upon due service of such summons as therein mentioned, the said Companies respectively shall not, by their secretary or other agent, appear before such magistrate or justices, in compliance with such summons, then and in such case it shall be lawful, and the said magistrate or justices are hereby authorised, empowered, and required to hear and proceed to adjudicate upon such complaint *ex parte*: Provided also, that such magistrate or justices shall, upon the hear-

ing of any such complaint by which of the parties of, and attending on, summons and hearing shall

Sect. 36 saves the right of the Birmingham, Bristol, and Junction Railway Company under the agreement of 1837, as to the working ways at the point of crossing.

Sect. 37 enacts: "That the Great Western Railway Company, and all persons authorised by them, shall at all times, whether before the completion of the Birmingham, Bristol, and Junction Railway, have liberty to construct, maintain, alter, and repair their line of way, and all necessary works and conveniences connected with, on and across the lands referred to in the said agreement of Feb. 4, 1837, on which, by the said agreement, they have a right to enter, make and maintain upon the lands, to cleanse, alter, repair thereon or therein, cuts, drains, embankments, and other works, being the works of the said Great Western Railway Company, as may be necessary or convenient for the purposes of the said Great Western Railway; and to pass and go across the said lands with engines, carriages, and other vehicles without hindrance or obstruction by or on the part of the Birmingham, Bristol, and

Thirdly, the defendants are bound to work the defendants' line in connection with the Great Western and Birmingham lines. The 8 & 9 Vict. c. clvi. recites, that it is to be worked as a separate and independent undertaking, with advantage to the proprietors, but the same is to be advantageously worked in connection with the Great Western and Birmingham Railway; and then empowers the defendants to lease it. And it was the intention of the parties that it should be so worked. Fourthly, the defendants are not to be regarded as lessees of a separate line. Rights are to be had to the possession of the defendants' own land, and in estimating the power of a party to work effi-

the Great Western Railway Company, and it being subject or liable to the payment of any toll or sum to the said Birmingham, Bristol, and Thames Junction Railway Company, or any person claiming under them, but subject to the provisions in the Act recited and in this Act contained, and also, except as is otherwise mentioned, to the full enjoyment of the soil in the said lands being vested in the said Birmingham, Bristol, and Thames Junction Railway Company: And always, that if the said Birmingham, Bristol, and Thames Junction Railway shall not be used so as to be used as a communication across the Great Western Railway within five years from the passing of this Act, or if the said line shall be abandoned or cease to be used as a railway for the space of five years after the completion thereof as aforesaid, then in either of such cases, upon notice in writing tendered at any time by the said Great Western Railway Company to

the said Birmingham, Bristol, and Thames Junction Railway Company of the sum paid by them for the purchase of the lands mentioned in the said recited agreement, and hereinbefore referred to, the said lands shall thereupon absolutely vest in and become the property of the said Great Western Railway Company, freed from all right or interest of the said Birmingham, Bristol, and Thames Junction Railway Company, or of any person claiming under them in reference thereto, in like manner as though the Act authorising the construction of the said Birmingham, Bristol, and Thames Junction Railway had never passed, and the said lands had been originally purchased by and conveyed to the said Great Western Railway Company; and the said Great Western Railway Company shall be thenceforth freed and discharged from all obligations in respect of the said agreement hereinbefore recited, or any enactments consequent thereon or in relation thereto."

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ciently, the ability of the party is to be regarded. Maxims, rule 10, applies strongly: "*Verba generalia stringuntur ad habilitatem rei vel personæ.*"—"I grant to J. S. an annuity of 10*l.* a year, pro consensu et impendendo, if J. S. be a physician, it is understood of his counsel in physic, and, if he be a lawyer, of his counsel in law. So, if I do let a tenement near by my dwelling house in a borough, provided he shall not erect or use any shop in the same without license, and afterwards I license him to erect a shop, if J. S. is then a milliner, he shall not by virtue of the general words erect a joiner's shop." Fifthly, it is said that this covenant is merely to indemnify the plaintiffs against the forfeiture provided by the 210th clause of 6 Wm. IV. c. 65 (a). The effect cannot be so, for the first covenant is effectually to work, and the second is to indemnify the plaintiffs against all liability; both are distinct, and there is no allusion to forfeiture in the first covenant. The second covenant is effectually to work and indemnify: See *Anstey* (b). At all events, it must be more than

(a) Which enacts, "That if the said railway, or any part thereof, shall at any time hereafter be abandoned or given up by the said Company, or, after the same shall have been completed, shall, for the space of three years, cease to be used and employed as a railway, then and in such case the lands so purchased or taken by the said Company for the purposes of this Act or otherwise, the part thereof, over which the said railway, or any part of such railway, which shall be so abandoned or given up by the said Company, shall pass, shall vest in the owners for the time being of the land adjoining that which shall be so abandoned or given

up, in manner following (to say), one moiety thereof to the owners of the land on one side, and the remainder to the owners of the land on the other side thereof."

Sect. 85 enacts: "That in the event of the said railway, or any part thereof, being at any time abandoned or discontinued by the said Company, the space of three months after the date of the discontinuance thereof shall be reinstated, and the said Company was not to be liable for the same, and the trustees of the roads used for the reinstatement."

(b) 2 Bing. 519.

nant to indemnify against forfeiture, for it is an indemnity against the consequences of any non-repair. The ruling was wrong on all the points.

Channell (with whom was *Bovill*) contra.—It must be contended, that, under all circumstances and in every event, the defendants were bound to carry passenger trains; and if in any event the defendants could effectually work the line without running passenger trains, then the judgment must be for the defendants. If more could be realised by carrying goods than passengers, then clearly the defendants would not be bound to carry passengers, and the line would be effectually worked. The clauses relied upon by the plaintiffs only shew that the defendants are to pay if they carry passengers; but not that they are bound to carry them. [*Parke*, B.—Suppose the line was altogether occupied with luggage trains, would you then be bound to run passenger trains? *Coleridge*, J.—Must we not look at the obligation of the plaintiffs under their Act, and see whether they were justified in putting themselves in a condition not to be able to carry passengers? This may guide us in giving a meaning to what is an efficient working.] The plaintiffs by their Act were not bound to carry passengers; they were only empowered to carry them. No loss is shewn by the defendants not running passenger trains. Secondly, the defendants had no power to stop the trains of the Great Western Railway Company. The lease is silent as to the agreement. Some allusion would have been made to the agreement if it had been intended to transfer its provisions. [*Martin*, B.—Could not the defendants sue the Great Western Railway Company on the agreement in the name of the plaintiffs? was it not a right with reference to the railway?] The obligation to run corresponding trains is not such a right. Even if the defendants had the power of compelling the Great Western Railway Company to stop their trains, they were not bound to enforce that

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power. Thirdly, the defendants were not bound to work the line in connection with their own. There is nothing in the lease to that effect, and the leasing Act cannot carry it further. [*Coleridge, J.*—It is clear that the defendants would not have taken the line to work separately. The Act recites, that it would be advantageous to work the two lines in connection. That must have been proved as a preliminary to obtaining the Act. *Parke, B.*—Suppose the lease had expressly excluded that which the defendants say is not included, that would have been committing fraud upon the legislature in order to induce the sanction of Parliament.] The expression ‘might be worked in connection’ does not mean that it would be so worked.—He also contended, that, on the fourth and fifth points, the ruling was correct.

Aspland in reply.

PARKE, B.—The case comes before us upon a bill of exceptions to the ruling of the Lord Chief Justice of the Common Pleas on the trial of an action of covenant brought by the plaintiffs against the defendants. The questions arising on the construction of that covenant we are informed, had been before the Court of Common Pleas, upon cross motions by the plaintiffs and the defendants, and the ruling was in conformity with, or rather was, the ultimate opinion of the Court, though necessarily in the record it is treated as the ruling of my Lord Chief Justice. The questions arising on the record were fully and most satisfactorily argued on both sides before us, and I have now to state the opinion of my brethren and myself on each of them.

The action is brought on a covenant contained in a lease by the plaintiffs to the London and Birmingham Railway Company, which has since been incorporated with, and had its liabilities transferred to, the defend-

ants. The lease was made on the 10th of March, 1836, pursuant to an Act of the 8 & 9 Vict. c. clvi., for enabling the London and Birmingham Railway Company to take a lease of the West London Railway. The West London Railway Company had, under its then name of the Birmingham, Bristol, and Thames Junction Railway Company, and under an Act of the 6 Will. 4, c. lxxix., made a railway from the basin of the Kensington Canal to join the defendants' railway near Harlesden Green; and there was in that Act of Parliament a clause, the 210th, providing, that, if the railway or any part should be abandoned or given up, or if after it was completed it should for three years cease to be used as a railway, the lands purchased for the purposes of the Act should revert in the owners of the adjoining land. In the progress of the works the plaintiffs and the Great Western Railway Company became competitors for the purchase of a small piece of land belonging to the Bishop of London, over which both railways would have to pass; and an agreement, under the seal of both Companies, was executed, dated the 4th of February, 1837, which recited the above fact, and also that the Bishop had conveyed the land to the Company now the plaintiffs, subject to the right of the Great Western Railway Company to construct their railway across it; and the deed contains mutual covenants regulating the right of each Company in respect of such piece of land so conveyed. The Great Western Railway Company covenant with the Company now the West London Railway Company, to construct a railway station at the point of junction for the purpose of transferring passengers and goods from the one railway to the other, and to stop the trains for the purpose of meeting corresponding trains of that Company, in the manner particularly detailed in that deed. In the year 1840 another Act, the 3 & 4 Vict. c. cv. passed, giving further powers to the Company now the plaintiffs; and, in the 34th sec-

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tion of that Act, it recites the agreement of the 4th of February, 1837; regulates the mode of crossing until the plaintiffs' railway should be completed; saves the plaintiffs' rights under the agreement by section 36; and, by section 37, provides that if the plaintiffs' line is abandoned or ceases to be used as a railway for three years after its completion, then, on payment or tender to them of the purchase-money of the piece of land mentioned in the agreement, that land should vest in the Great Western Railway Company. In July, 1845, the London and Birmingham Railway Company, having previously agreed with the plaintiffs to take a lease of their railway, obtained an Act of Parliament (the 8 & 9 Vict. c. clvi.) to enable them to take that lease. It recites that it had been found that the West London Railway, which name was given to the plaintiffs' railway by the 3 & 4 Vict. c. cv., could not be worked as a separate and independent undertaking with advantage to the proprietors thereof; but that the same might be advantageously worked and used in connection with the London and Birmingham and the Great Western Railways, or either of them, by either of the Companies to whom those railways belonged; and power is given to the West London Railway Company to lease to the London and Birmingham Railway Company their railway, stations, &c., and all their rights, powers, and privileges in relation thereto; and it is declared to be lawful for the London and Birmingham Railway Company to accept such lease, and to use, exercise, and enjoy all such powers, rights, and privileges as aforesaid, subject to the provisions of that Act, and to the performance of the conditions in the lease. Pursuant to the Act, the lease from the plaintiffs to the London and Birmingham Railway Company was executed on the 10th of March, 1846, upon a covenant in which the present action is brought against the London and North Western Railway Company. This indenture recites the Act, and witnesseth, that, in consi-

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deration of 60,000*l.* paid by the London and Birmingham Railway Company to the plaintiffs, the latter, in pursuance of the said power, did grant, demise, and lease unto the London and Birmingham Railway Company the West London Railway, and all stations, wharfs, buildings, and appurtenances thereto belonging, or held, used, and enjoyed therewith, and the rates and tolls payable in respect thereof, together with all the rights, powers, and privileges of the West London Railway Company in relation thereto, and also the free and uninterrupted use of the Kensington Canal, for the purposes of the traffic of the London and Birmingham Railway Company and the West London Railway. And it was agreed, that, during the continuance of the lease, the London and Birmingham Railway Company should, within twenty-one days after the 30th of June and the 31st of December, in every year, carry to the credit of the West London Railway Company such a sum of money as should be equivalent to one-fourth part of the gross sums received by the London and Birmingham Railway Company during the period of six calendar months next preceding the said 30th of June and the 31st of December, in respect of passengers, goods, and other things carried or landed on the West London Railway, or the lands and appurtenances thereto belonging, or on or over any alterations and improvements in any of the premises demised, or in lieu of, or by way of substitution for, any part thereof, and also such a sum of money as should be equivalent to one-half of the net profits arising from the rates, tolls, and duties to be received for the use of the same respectively, from persons providing their own locomotive or other moving power or carriages. Then followed the material covenant upon which this question turns. It was in these terms, "That the London and Birmingham Railway Company should, at their own expense, during the continuance of the lease, efficiently work and repair the railway and works de-

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mised, and indemnify the West London Railway Company against all liabilities, loss, charges, and expenses, claims and demands, whether incurred or sustained in consequence of any want of repair, or in consequence of not working, or in any manner connected with the working of the same railway and works;" but the West London Railway Company should have no control whatever over the working or management by the London and Birmingham Railway Company of the West London Railway or works. Several breaches were assigned, to which it is not material to advert. The sixth was, that the defendants did not efficiently work the said railway; to which the defendants pleaded that they did efficiently work it: and on that issue the Lord Chief Justice directed the jury. The only question for us to decide is, whether the direction of my Lord Chief Justice was right in all the particulars pointed out in the bill of exceptions. There were several objections, and we propose to give our opinion on each; for though, if we decided that one only was wrong, a venire de novo would be granted, it would leave the case in a very unsatisfactory condition, and prolong a litigation which it is very desirable, if possible, to terminate by laying down a rule which may lead the parties to settle the proper damages to be paid by arbitration.

The exceptions are, that the Lord Chief Justice was wrong in stating his opinion to the jury on the following eight particulars:—First, that, under the said covenant, and in order to perform the same, the defendants were not bound to work the said West London line, nor was it necessary that the same should be worked for passenger traffic as well as for goods traffic. Secondly, that it was not necessary that the defendants should work the said West London Railway and works, or that the same should be worked for passenger traffic as well as for goods traffic, if such traffic presented itself. Thirdly, that the agreement of the 4th of February, 1837, was not transferred to the defendants or

made binding between them and the Great Western Railway Company; and that, therefore, the defendants had no power to compel the Great Western Railway Company to stop trains on the line of the Great Western Railway. Fourthly, that the defendants were not bound to work the West London line, and that it was not necessary that the same should be worked in connection with trains on the Great Western Railway. Fifthly, that the defendants were not bound to compel the Great Western Railway Company to stop trains on the Great Western line where necessary for the purpose of working in connection with the West London line. Sixthly, that the defendants were not bound to work the West London line, and that it was not necessary that the same should be worked, in connection with trains on the line of the defendants. Seventhly, that the defendants respectively were not bound to stop the trains of the defendants on the line of the London and Birmingham, and London and North Western Railways respectively, where necessary for that purpose. Eighthly, that the defendants must be treated by the jury, for the purpose of considering their liability under the said covenant, as if they were lessees of a separate and independent line, having no control over the Great Western, and London and Birmingham, and London and North Western Railways, or any of them. It was suggested to us on the argument, that, in giving this opinion, the Lord Chief Justice acted in some degree on the principle which is stated to us to have been sanctioned by most of the Judges of the Court of Common Pleas, and of whose opinions we have been furnished with a printed report, but not from the regular reporters of that Court. The principle suggested is, that, taking the whole of the covenant together, the main object of it was that the railway was to be worked so as to prevent any loss or forfeiture or injury to the plaintiffs in consequence of not working; but as long as that was done, it might be worked in any way that

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the lessees pleased; that the lessees merely took on themselves the obligation of the lessors, and undertook to relieve them from the obligation cast on them by the Acts of Parliament. But the able argument of my Brother *Byles* satisfied us that this was too narrow a view of the construction of the covenant in question, and we so intimated our opinion in the course of the argument. Had the object been merely to protect the plaintiffs from the forfeiture of the line under one of the clauses already referred to, either under the 6 Will. 4, c. lxxiv. s. 210, by abandoning or giving up or ceasing to use it as a railway, or under the 3 & 4 Vict. c. cv. s. 37, by abandoning or ceasing to use it for three years, it would have been unnecessary to do more than to covenant not to abandon, give up, or cease to use the railway: the covenant to indemnify against all liabilities, loss, charges, and expenses, claims, and demands, in consequence of any want of repair, or in any manner connected with the working of the railway and works, and more especially the covenant to work efficiently, would have been quite unnecessary, if the object had been merely to preserve the railway to the plaintiffs' Company. We must give effect to all the words of the covenant if we can; and in so doing, we do not think that the obligation can be limited in the way which has been suggested. The railway is to be worked efficiently, and efficiently repaired; and the plaintiffs are to share in the gross profits in the proportion of one-fourth, and in half the net profits of the rates and tolls payable by others using their own locomotive power. This shews that the object of the covenant to work efficiently was to secure the stipulated benefit to the plaintiffs on the gross profits, and efficiently to repair, to give them a chance of a share of the net profits. But we agree with the reported judgment of my Brother *Maule*, that it never could have been intended that the defendants' Company were to work the railway in such a manner as to produce

the largest quantity of gross proceeds. That might entail a ruinous loss on themselves; they were not bound to lay down a double railway where a single one was before, or to apply a part of their large capital to the erection of new stations, or to disarrange all their plans, so as to make the plaintiffs' line of railway productive at the expense of their own. A fair and reasonable mode of working the railway, so as to make it productive, is all that can be required.

We now proceed to consider the eight points made by the bill of exceptions, keeping these observations in view. The first of these depends upon the question, whether the defendants were, under all circumstances, bound to perform the covenant "to work efficiently," bound to work the line for passenger traffic. We think that the proposition cannot be maintained—at least all of us so think, with the exception of my Brothers *Platt* and *Martin*, who are not satisfied to concur in this particular part of the judgment, although they concur in the other parts. A satisfactory criterion of the truth of it was offered by my Brother *Channell*, when he asked, whether it would be a good breach of such a covenant to state simply that the defendants did not work the railway for passenger traffic. We, with the exception of my Brothers *Platt* and *Martin*, think it clearly would not. If as much gross profits could be obtained by efficiently working the railway for goods only, as for passengers only, or for both passengers and goods—and there is no evidence stated in this case that it could not—surely the plaintiffs had no right to complain. We, therefore, think that the first objection cannot be maintained. The second is of the same nature: it seems a strange thing to assert, that they are not bound to carry passengers even if passenger traffic presented itself; but in truth the same answer is to be given, that if they work the railway efficiently for goods, so as to produce as much gross profit as the railway when worked for passengers and goods, or passengers alone, would produce, they perform their cove-

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nant. The mode of working the railway is certainly in their discretion. The third question is, whether the Chief Justice was right in his opinion that the agreement of the 4th of February, 1837, was not transferred to the defendants, and that therefore the defendants had no power to compel the Great Western Railway Company to stop trains on their railway, pursuant to their covenant contained in that agreement. We think that this covenant to make a station on certain land, and to stop the trains there, which affects the value of the land, and of the whole of the plaintiffs' railway, is one which runs with the estate in the plaintiffs' railway (the cases on the subject are collected in the notes to *Spencer's* case, in the first volume of Smith's Leading Cases, p. 22); and that the assignee of the whole estate in the railway could sue upon the covenant at common law. Whether the assignee of that estate for a term of years, as the defendants are, could sue at common law, is not a point which has been settled, the cases on the subject being generally those of covenants for title which pass with the entire estate; but as this is a covenant affecting the Company's temporary enjoyment of the estate, and consequently beneficial to the owners of it pro tempore, there is no reason why it should not, as in the case of covenants affecting the reversions which are transferred with part of the reversion, or the reversion of part by operation of the statute of 32 Hen. 8, c. 34: Co. Litt. 215. a., *Twynam v. Pickard* (a). At all events, we think that the words of the statute 8 & 9 Vict. c. cv., and of the lease, are sufficient to vest the rights under the agreement in the defendants, as not only the railway, but all the rights, powers, and privileges of the plaintiffs in relation thereto, are demised by the plaintiffs to the defendants; and this is a power and privilege which does relate to the railway. For these reasons we do not agree in the

(a) 2 B. & Ald. 105.

ion of my Lord Chief Justice on the third question, that defendants had not power to compel the Great Western way Company to stop the trains on the line of the Great Western Railway Company: that part of his direction we think wrong.

The fourth and fifth objections admit of a different answer; and on those the direction was right, on the same principle that the first and second were. Though the defendants had power, they were not bound to exercise it necessarily as part of their efficient working of the railway; and the defendants were not bound necessarily to connect the West London Railway in connection with trains of the Great Western Railway, as a part of their obligation to work efficiently. It would not have been a good breach of their covenant to allege simply that they did not so work the line. Precisely the same observation is to be made on the sixth and seventh objections: there is no covenant in the lease obliging the defendants to work their line in connection with either in particular, or with both the Great Western and the London and North Western lines together, though it is difficult to see how practically they could work the lines efficiently without some connection with one or the other. This would be for the jury; and if the jury found that they could work the line efficiently without, so as to satisfy the covenant, that would be sufficient.

The last position laid down by the Chief Justice is, that the defendants must be treated by the jury, for the purpose of considering the liability of the defendants, as if they were the lessees of a separate and independent line, having no control over the Great Western and London and North Western Railways. We do not think that proposition correct. The covenant to work efficiently must be construed with reference to the subject-matter and the character of the defendants. The maxim of Lord Bacon, quoted by my Brother *Ryles*, as giving

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one of the rules for the construction of instruments, applies in this case: "*Verba generalia restringuntur ad habilitatem rei vel personæ*;" and the word "efficient" must admit of a different construction in a covenant by a person armed with very limited or very extensive powers. If this railway had been leased to a single individual or Company without any connection with any other railway, and leased alone, the measure of efficient working, we cannot help thinking, would be very different from what would be required from a Company whose line was connected with it, who had the entire control over their own line, and were armed with the power of adding to the traffic of the railway by the control possessed over another line, and whose capabilities and powers in that respect were reasons which disposed Parliament to permit the lease to be made to them. It is difficult, indeed almost impossible, to define the precise nature and degree of efficient working which such a Company ought to apply under the covenant. It is not so difficult to say that it ought to be different and greater than would be required from a Company or an individual who had nothing but the railway leased. They would only be required to supply convenient accommodation and attendance for the receipt, and sufficient means of carriage of, such goods and passengers as might be offered at one terminus or at intermediate stations, to be carried to the other terminus to some other intermediate station; and this however small the gross receipts might be. But that would be too small a measure of efficient working in the case of the defendants, who have the power of supplying more goods and passengers themselves, by facilitating the transit of goods from Harlesden Green to the Kensington terminus of the Great Western station, or by increasing the facilities for receiving them at the Kensington terminus by arrangements made within their power, without any serious injury to their own concern. They are certainly not bound to make a sacrifice of their own concern for the purpose

efficiently working this line, so as to produce the greatest profits for the plaintiffs and themselves. The covenant must have a reasonable construction in this respect. But they are, we think, bound to do more than a lessee of merely the railway in question, unconnected with any other, would be bound to do. Therefore, there must be a *venire de novo*.

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Venire de novo.

COURT OF QUEEN'S BENCH.

Michaelmas Term, 1852.

In re HALL and THE NORFOLK ESTUARY COMPANY.

Nov. 22nd.

A RULE had been obtained in this case calling upon the secretary of the above-named Company to shew cause why a writ of mandamus should not issue, commanding him to enter and register a memorandum of a deed of transfer of twenty-four shares in the Company in the name of Robert W. Bennett.

The effect of the 16th section of the 8 & 9 Vict. c. 16, is to disqualify any shareholder from making an effectual transfer of his shares whilst any call remains unpaid, and the secretary is not bound to register a deed of transfer of such shares whilst a call remains unpaid.

The Company, it appeared, was incorporated by 9 & 10 Vict. c. ccclxxxviii., which contained a clause embodying in it the Companies Clauses Consolidation Act.

The said Robert W. Bennett was a holder of twenty-four shares in the Company, and on the 13th of March last sold and duly assigned them to Hall. On the same day, Bennett's broker lodged the deed of transfer with the secretary of the Company for registration, but he refused to register the same, on the ground of the insufficiency of Hall's address. The affidavit of the secretary, in opposition to the rule, stated, that, on the 5th of February last a call of 2*l*. 10*s*. per share was made upon the shares of the

Wordsworth contra.—The sections relied on intended as a protection to the Company; but it assumes that there may be a valid transfer before calls are paid up, the 15th section providing, that, "if a transfer has been so delivered to the secretary as to entitle the vendor of the share to be registered as shareholder, the vendor shall continue liable to the Company for any calls that may be made upon such share, and the purchaser of the share shall not be entitled to any share of the profits of the undertaking, or to any dividend in respect of such share." This section must be taken in conjunction with section 16, and the meaning is, that a defaulting shareholder shall not transfer his share so as to confer all the benefits of a shareholder on the transferee, yet the Company is bound to register the transfer if it is duly stamped. See *Stikeman v. Dawson* (b), *Ex parte Tooke, &c.* (c), *v. Blane* (d).

PATTERSON, J.—The simple question here is, what is the meaning of the words of the 16th section of the Act, "no shareholder shall be entitled to transfer his share until he shall have paid all calls for the amount due"? Every shareholder is, by the 14th section, entitled to sell and transfer his shares, and "every transfer shall be by deed duly stamped." Then, provided by the 15th section, that the said deed of

(when duly executed) shall be delivered to the secretary for registration. The transfer and the deed, therefore, are synonymous; and it seems to me, that the legislature intended that no person should be at liberty to transfer his interest in any shares except by deed, and that not whilst a call remained unpaid. The Company, knowing the facts, were, I think, at liberty to refuse to register the transfer. They would, perhaps, have done better if they had at once, when the deed was left for registration, informed the party that it was worth nothing. They might be put in considerable difficulty by registering a transfer which they knew to be a bad one. I think we must read the words of the Act as meaning, that shares shall not be transferred until the calls due upon them at the time have been actually paid. If the deed had been delivered as an escrow, to take effect upon the payment of the calls by the transferee, a different question might have arisen; but here there was nothing of that kind, for the deed was intended to be complete and effective on the day of its execution. I think that this rule ought to be discharged.

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COLERIDGE, J.—I am also of the same opinion, though with regret, as the objection rests on a ground purely vexatious, and which cannot avail hereafter if a proper transfer be made; but the question is, what is the law? The particular section of the Act was passed for the benefit of the Company, and to prevent a shareholder from transferring his shares except in a particular way. The right to transfer must be exercised in the way the 14th section gives it, and subject to the regulations afterwards expressed in the 15th and 16th sections; the 16th section in effect saying, that, during the time that calls remain unpaid, the right to transfer shall not exist. That it has this meaning may be gathered from the difference between the 15th and 16th sections, and the 18th section. The latter section, which provides for the devolution of shares in cases of death, bankruptcy, insolvency, mar-

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riage, or by any other lawful means than by transfer according to the Act and before provided for, assumes the interest in the shares to pass; but enacts, that, until transmission authenticated in the way thereby provided, the transferee shall not be entitled to receive any share of the profits, nor to vote as the holder of any such share: very different from the 16th section, which seems to take away the power of transferring at all by deed, until the transferror shall have paid all calls for the time being due. I think, therefore, that the transfer, though complete as between the parties, was void as regards the Company.

WIGHTMAN, J.—I also reluctantly agree with the rest of the Court. The 14th section provides, that every shareholder may sell and transfer his shares, but that every such transfer shall be by deed; and the 15th section provides, that until “such transfer” has been delivered to the secretary for registration, the vendor of the shares shall continue liable to the Company for any calls made upon such shares, and the purchaser of the shares shall not be entitled to receive any share of the profits or to vote in respect of such shares. These two sections treat the transfer by deed as a complete transfer, requiring nothing more to be done than to have it registered in the manner pointed out by the 15th section. But, by the 16th section it is enacted, that no shareholder “shall be entitled to transfer any share after any call shall have been made in respect thereof, until he shall have paid such call, nor until he shall have paid all calls for the time being due on every share held by him.” The effect of this section is to disqualify any shareholder from making any effective transfer of his shares whilst any call remains unpaid; and there seems very good reason for the disqualification, although it may in this case cause a hardship. The words of the section are too strong to be got over.

Rule discharged

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Easter Term, 1852.

BEAR and Others v. BROMLEY.

April 16th.

DEBT by payees against the maker of a promissory note.—Plea (*inter alia*), that the consideration for the promissory note in the first count mentioned was money lent to the defendant by a Joint-stock Company—that is to say, a partnership, which, before and at the time of the said lending, consisted of more than twenty-five members, the said number of more than twenty-five not being caused by an admission subsequent on devolution or other act of law; which said Joint-stock Company had, before the said lending and after the 1st of November, 1844, been established in England for a purpose of profit, to wit, for the purpose of lending money, and was not a banking Company, school, or scientific or literary institution, or friendly society, loan society, or benefit building society, duly certified and enrolled under the statute in force respecting such societies; nor was the said Company incorporated by statute or charter; nor was it authorised by statute or letters patent to sue and be sued in the name of any officer or person. That, in lending the said money to the defendant, the said Company acted otherwise than provisionally in accordance with the statute in such case made; and that the said Company had not, at the time of lending the said money, obtained a certificate of complete registration as provided in and by the statute in such case made; but that the said Company, at the time of the making of the said note, illegally, and contrary to the form of the statute in such case made, lent to the defendant a certain sum of money out of the funds of the said Company at interest, and with a view to the profit

A society was established for raising money by subscription, and lending it to their members at interest; premiums on the loans were payable monthly, and all the money received for interest, premiums, and fines went into a general fund of the society:—*Held*, that the society was not a Company established for the purpose of profit within the Joint-stock Companies Registration Act, and therefore did not require to be registered.

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of the said Company, and in the course of carrying on the business of the said Company. That the defendant made the said note and delivered the same to the plaintiffs, they then being the trustees of the said Company, at the request of the said Company, and for their benefit, to secure to the said Company the payment of the money so lent and interest as aforesaid, and in consideration of the said loan and without any other value or consideration. Verification.—Replication de injuriâ.

The cause was tried, before Lord *Campbell*, C. J., at the London Sittings after Hilary Term last, when it appeared that the plaintiffs were the trustees of the “No. 2 Colchester Mutual Fund” Loan Society, established in 1848, for raising money by subscription and lending it to the members, consisting of more than twenty-five, at interest. The defendant was a member of the society, and, having borrowed money of them, the promissory note in the declaration mentioned was given to the plaintiffs, as such trustees, to secure the repayment of that loan with interest. The rules of the society were not enrolled or certified. The shares of the society were 40*l.* each, and the premiums on the loans were payable by monthly instalments. All the money received for interest, premiums, and fines, went into a general fund of the society.

At the trial the defendant contended that the above plea was proved; however, the plaintiffs had a verdict for the sum claimed, leave being reserved to the defendant to move to enter the verdict for him on the above plea, if the Court should be of opinion that the society was a Joint-stock Company, established for the purpose of profit, and requiring to be registered under the 7 & 8 Vict. c. 110, the Joint-stock Companies Registration Act.

Horn now moved (a).—This society is a partnership

(a) Before Lord *Campbell*, C. J., *Wightman*, J., *Erle*, J., and *Crompton*, J.

the 7 & 8 Vict. c. 110, and, not being registered, the plaintiff is entitled to the verdict. It is a society established for the purpose of profit, within the 2nd section (a): *v. Barnes* (b). Benefit building societies are exempted from the operation of the Act, which shews the legislature considered that they would be within it but for the exemption. *Reg. v. Whitmarsh* (c) does not apply. [*Erle, J.*—Was not the ground of the decision in this case, profit?] Profit to the society. If some of the

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Which enacts, "That this Act shall apply to every Joint-stock Company, as hereinafter defined, established in any part of the United Kingdom of Great Britain and Ireland except Scotland, or established in Scotland, having an office or place of business in any other part of the United Kingdom, for any commercial purpose, or for any purpose of profit, or for the purpose of making assurance or insurance (except banking companies, schools, scientific and literary institutions, and also friendly societies, and benefit building societies, respectively certified and enrolled under statutes in force respecting such societies, other than such societies as grant assurance on lives to the extent after specified); and that no 'Joint-stock Company' shall comprehend,—

every partnership whereof the capital is divided or agreed to be divided into shares, and so as to be transferable without the consent of all the co-partners; and also, every assurance company or institution for the purpose of

assurance or insurance on lives, or against any contingency involving the duration of human life, or against the risk of loss or damage by fire, or by storm or other casualty, or against the risk of loss or damage to ships at sea or on voyage, or to their cargoes, or for granting or purchasing annuities on lives; and also every institution enrolled under any of the Acts of Parliament relating to friendly societies, which institution shall make assurances on lives, or against any contingency involving the duration of human life to an extent upon one life or for any one person to an amount exceeding two hundred pounds, whether such companies, societies, or institutions shall be Joint-stock Companies or mutual assurance societies, or both; and also,

"Every partnership which at its formation or by subsequent admission (except any admission subsequent on devolution or other act in law,) shall consist of more than twenty-five members."

(b) 6 Bing. N. C. 180.

(c) 15 Q. B. 600.

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members gain at the expense of others, it is a partnership within the statute, and should be registered.—He cited *Beaumont v. Meredith* (a).

LORD CAMPBELL, C. J.—I think that there ought to be no rule. This point has been determined in *Reg. v. Whitmarsh*. The question there was, whether the society was established for the purpose of profit, and not whether the individual members might be gainers or losers. It is clear that this is not a society established for the purpose of profit, because as such they make no profit. Some members may lose and others may gain; but the society gets nothing by way of profit. The statute does not therefore apply, and the plea is not proved.

WIGHTMAN, J., concurred.

ERLE, J.—The principle of *Reg. v. Whitmarsh* is, that, when several partners or shareholders have subscribed money and carry on business amongst themselves, by which a profit or advantage may be secured to the individual shareholders, but not a profit to the society as such, that is not a partnership or company established for the purpose of profit within the meaning of the 7 & 8 Vict. c. 110. The dealings of this society are exclusively amongst the members, for the benefit of the members; and, independently of this, the society gains nothing. All the powers in respect of the regulation of the society are merely subsidiary to the governing purpose for which the society was established. The grounds of the judgment in *Reg. v. Whitmarsh* apply equally to this case.

CROMPTON, J., concurred.

Rule refused.

(a) 3 V. & B. 180.

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Trinity Term, 1852.

**WILKINSON v. THE ANGLO-CALIFORNIAN GOLD MINING
COMPANY.**

June 4th.

CASE.—The declaration stated, that the defendants were a Joint-stock Company, completely registered in pursuance of the 7 & 8 Vict. c. 110, and formed by a deed of settlement dated the 16th of August, A. D. 1851. That the said deed of settlement contained, amongst others, a provision, that the present capital of the defendants should be 50,000*l.*, to be subscribed for in 100,000 shares of 10*s.* each, and that the whole of such sum of 10*s.* for each share should be paid up within twenty-one days after the complete registration of the defendants; and, lastly, a provision, designated in the aforesaid deed of settlement by the number 179, and which was in the words following: “That whenever, under any of the provisions of these presents, a certain number of days or other period is required to elapse in order to give effect to any provision, in deed, matter, or thing, or any period or number of years is fixed for any purpose whatsoever, the first of such years or the first day of such period shall be excluded therefrom, and the last of such days or the last day of such period shall be reckoned and included in, the computation of the period required. And it is hereby agreed and determined, between and by the parties to these presents, that, notwithstanding the dates of the respective execution of these presents by the respective parties hereto, the contract intended to be effectuated by these presents shall be held to have commenced as and from the day first above written; and that the share or shares of every subscriber

The holder of shares in a Joint-stock Company, who has not executed the deed of settlement, is not entitled to a certificate of proprietorship under section 51 of 7 & 8 Vict. c. 110.

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for any part of the capital of the Company, who shall not execute these presents within three months from the day of the date hereof, shall be forfeited, if the board of directors shall think fit, and the amount paid upon such share or shares shall become the property of the Company." That, before and at the time of the complete registration of the defendants as such Company as aforesaid, and before and at the time of the plaintiff executing the aforesaid deed of settlement as thereafter mentioned, the plaintiff became and was a subscriber for twenty shares of 10s. each in the said capital or joint-stock of the defendants, such shares to be received by the plaintiff as soon as the defendants were completely registered as such Company as aforesaid. And that, within twenty-one days after the complete registration of the defendants as aforesaid, and before the execution of the said deed of settlement by the plaintiff as thereafter mentioned, and within three months from the day of the date of the aforesaid deed of settlement, the plaintiff had paid the defendants the full amount of 10s. for and in respect of each and every of the said twenty shares so subscribed for by him as thereinbefore mentioned. That, after the complete registration of the defendants as such Company as aforesaid, and before the committing of the grievances hereinafter mentioned, and whilst the plaintiff was such subscriber as aforesaid, the plaintiff duly executed the said deed of settlement under which the defendants as such Company were formed as aforesaid, except as to the said therein and hereinbefore mentioned provision, designated by the number 179 as aforesaid, of which the defendants then had due notice; and the plaintiff then, and after the defendants were completely registered as aforesaid, and before and at the time of the committing of the grievances hereinafter stated, became and was entitled, under and by virtue of the aforesaid statute and of the premises aforesaid, to have, made out by the defend-

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ts, a certificate of the proprietorship of the before-mentioned shares for which the plaintiff had so subscribed as thereinbefore stated, specifying therein respectively the shares to which the plaintiff was entitled, and the amount paid up in respect of such shares at the date of such certificate, and to have such certificate, with the common seal of the defendants affixed thereto, delivered to him the plaintiff on demand; and although afterwards, and whilst he the plaintiff was entitled to such certificate as aforesaid, and before the committing of the alleged grievances, the plaintiff did, pursuant to the said thereinbefore-mentioned statute, demand of the defendants that the defendants should cause a certificate of the proprietorship of each of the before-mentioned shares to be delivered to him the plaintiff, as the holder and proprietor of such shares, pursuant to the provisions of the said Act of Parliament; yet the defendants did not nor would, on demand made by the plaintiff as aforesaid, or at any other time, cause a certificate of the proprietorship of the before-mentioned shares, or of any or of either of them, to be delivered to the plaintiff as proprietor thereof; but the defendants, although often requested so to do, and although a reasonable time for making out and delivering such certificate as aforesaid had long elapsed before the commencement of this suit, had hitherto wholly neglected and refused, and still doth neglect and refuse, to make out and deliver such certificate as aforesaid.

Second plea.—That the formation of the said Company was commenced after the 1st day of November, 1844, and that it was a Company within the operation of the Act of Parliament in the declaration mentioned; that the plaintiff had not, at the time of the committing of the alleged grievances, executed the deed of settlement of the said Company or any deed referring thereto.—Verification.

Special demurrer.—That the second plea did not con-

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fess that the plaintiff executed the deed of settl
 and that it contained an argumentative traverse, t
 plaintiff executed the said deed of settlement, and t
 Company were formed under the deed of settlemen
 the declaration mentioned.

Pearson in support of the demurrer (*a*).—The
 bad, and the declaration is good. There was no ne
 for the plaintiff to have executed the deed of sett
 to entitle himself to a certificate of proprietorship.
 is no clause of the Joint-stock Companies Act,
 Vict. c. 110, requiring this. The 25th section is
 general; and the 51st section (*b*), upon which the q
 turns, gives the “holder of any share” a right to t
 tificate. The interpretation clause, section 3(*c*),
 relied on; but it is plain that a person may consiste
 “entitled to a share” or be a “shareholder,” and no
 executed the deed. [Lord *Campbell*.—The term ‘
 holder’ appears to be used in a different sense in di
 parts of the Act.] That is so. Section 26 u

(*a*) Before Lord *Campbell*, C.J.,
Coleridge, J., *Erle*, J., and *Cromp-*
ton, J.

(*b*) Which enacts, “That, on
 demand of the holder of any share
 in any Joint-stock Company com-
 pletely registered under this Act,
 the Company shall cause a certi-
 ficate of the proprietorship of
 such share to be delivered to such
 shareholder, specifying the share
 in the undertaking to which such
 shareholder is entitled, and the
 amount paid up in respect of
 such share at the date of such
 certificate, and shall have the
 common seal of the Company af-

fixed thereto; and for s
 tificate the Company n
 mand any sum not excee
 shilling; and that such ce
 must be according to the
 the Schedule (I) to this
 nexed, or to the like effe

(*c*) Which declares “Th
 ‘shareholder’ to mean a
 son entitled to a share in
 pany, and who has exect
 deed of settlement or a
 ferring to it, or, in the
 Mutual Assurance Societ
 person who shall be an
 member thereof.”

word "shareholder" in a more extended sense than that given to it by section 3; for he may for some purposes be a shareholder, and not have executed the deed of settlement. Section 52 (a) shews that the holder of shares may dispose of them without having the certificate. The terms "holder of shares" and "shareholder" may have different meanings.

Secondly, if the execution of the deed be a condition precedent to obtaining a certificate, it must be such a deed as is contemplated by the Act; and it is averred, that the defendant executed the deed under which the Company was formed, except as to clause 179, which is not according to the Act. [Lord *Campbell*.—But that clause is part of the deed, and how can there be a partial execution of it? Such an execution is unknown to the law. We agree that it must be taken on this declaration, that it does not allege any execution. You must therefore fall back on your first point.]

Willes contra.—The declaration must be taken as containing no averment of execution; and the simple question is, whether a party has a right to a certificate of registration without having executed the deed of settlement. That deed is the foundation of the Company's existence, and every shareholder undertakes to execute it. The words "subscriber" and "shareholder" are used in different senses, as appears from sections 3, 4, and 11; and the word "shareholder" or "holder of shares," entitled to go in to the market and sell, is declared to be one who has "executed the deed of settlement." [Lord *Campbell*, C. J.—

<p>(a) Which enacts, "That it shall be the duty of all Courts of justice, judges, justices, and others, to admit such certificate as <i>prima facie</i> evidence of the title of the shareholder to the</p>	<p>share therein specified; nevertheless, the want of such certificate shall not prevent the holder of any share from disposing thereof."</p>
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fact obtained that certificate.

Pearson in reply.

Lord CAMPBELL, C. J.—The defendants are e
our judgment. The question turns upon the
tion of the 51st section of the 7 & 8 Vict. c. 1
section enacts, that “on demand of the hold
share in any Joint-stock Company completely
under this Act, the Company shall cause a ce
the proprietorship of such share to be delivere
shareholder, specifying the share in the unde
which such shareholder is entitled,” &c. L
this section without the interpretation clause,
have said that the plaintiff’s view was correc
no condition is there imposed, but the right
to the holder of any share without qualifica
then we have the interpretation clause, by
legislature gives a meaning to the terms there
wherever such meaning is not excluded by th
The word “shareholder” is defined to mean “a
entitled to a share in a Company, and who has
the deed of settlement.” Wherever, therefor
that word used, unless there is something in tl

the deed of settlement, the Company shall issue the certificate. There is nothing repugnant to the context or absurd in so reading that section. The plaintiff is a holder of shares, but he has not executed the deed, he is not, therefore, entitled to the certificate. It is clear that this sense is not given to the word "shareholder" in section 26, because it is there said, that, upon executing the deed, a shareholder is to be entitled to certain privileges, thereby shewing that, without execution, he may be a shareholder, but not clothed with those privileges. On these grounds, I am of opinion that the declaration is defective, and that the plea is good.

COLERIDGE, J.—If, on the true construction of this statute, the plaintiff was bound to have executed the deed before he was entitled to a certificate of shares, the declaration is bad, for it must be read as containing no such allegation. The plaintiff, to support his claim, must bring himself within section 51. It was contended for a moment that the meaning of the term "holder of shares" was not the same as "shareholder;" but that argument cannot be supported. The interpretation clause gives a definition of the word "shareholder" and that definition is to be adopted so far as it is not excluded by the context or by the nature of the subject-matter. The effect of it is, that, wherever you find that word, it is to have this particular meaning, if the clause where it occurs can be so read; and there is nothing in section 51 to prevent that construction being given to the term there. It is, however, said, that, in section 26, this word cannot have the meaning given to it by the interpretation clause, and that it should not have that meaning given to it in section 51. But supposing that that is so as to section 26, the answer to the inference is, that the context excludes the proposed meaning in section 26, but not in section 51. This decision meets the justice of the case, for no person ought to be entitled to

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expressly given on the title of his being a stockholder. Turning, then, to the interpretation clause, we find the definition of "shareholder" to be a person who has taken to a share, and who has executed the deed of settlement. The declaration must be taken to contain no more than that the plaintiff had executed the deed, and therefore does not support the plaintiff's claim. The construction tallies with the whole of the statute, and removes the ambiguity which arises in section 26. It contemplates that Companies prior to their complete registration call those who are entitled to shares in such undertakings "subscribers," and they become "shareholders" when they have executed the deed of settlement. It seems to be the whole purview of the statute. The object in requiring a deed to be executed was, to provide evidence of persons who were likely to take the benefits of the company, and to abscond when it failed. The implication upon them to execute the deed is clear. Section 26th is founded on that supposition. Whatever the meaning of the word "shareholder" in that section, a shareholder is to have any of the profits or any remedies or powers given by the Act, until he has executed the deed and paid all calls due. It would be contrary to the intention of the statute if a person could claim

And thus he would be able to hold out to the world a false semblance of title.

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CROMPTON, J.—I confine myself to the construction of section 51 and section 3. By the 51st section, the party who may demand a certificate of shares is to be a holder of shares, which, by section 3, he is not unless he has executed the deed. Here the facts stated in the declaration make the plaintiff only a subscriber, that is, a person who has not executed the deed. Unless there is something repugnant, the interpretation clause is to be our guide. I quite agree with what has been said by Lord *Campbell*, that there is nothing repugnant in section 51. It has been argued that section 26 uses the word “shareholder” in a different sense. It is unnecessary to give an opinion as to that. Possibly, the word may have one sense in one clause, and another in the other. It is, however, clear to me, that the interpretation clause is in this respect not repugnant to the 51st section.

Judgment for the defendants (a).

(a) See *Stewart v. The Anglo Californian Gold Mining Company*, post.

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*Trinity Vacation, 1852.**June 18th.***M'KENZIE v. THE SLIGO AND SHANNON RAILWAY
COMPANY.**

The 13 & 14
Vict. c. 83, is
retrospective in
its operation.

An order for
the dissolution
of a Company
under the Joint-
stock Compa-
nies Winding-
up Act is no
bar to an action
against the
Company by a
creditor. Sec-
tion 73 operates
as a suspension
until proof
made before the
Master, after
which the cre-
ditor may pro-
ceed with the
action. The
omission of a
creditor to go
before the Mas-
ter, as directed
by section 73,
is not matter
of plea, but of
application to
stay proceed-
ings.

ASSUMPSIT on an award for the payment of a sum certain, and also on an account stated, the action being commenced on the 8th of March, 1850.

Fourth plea, that the defendants were a trading and commercial Company, viz. a Railway Company, incorporated by a certain Act of Parliament; and that, after the 14th of August, 1848, and before the making of the said order absolute, a certain petition was presented to the Court of Chancery by four of the directors of the said Company, alleging that the plaintiff had commenced an action against them for a debt due to him, and praying that the Company might be dissolved and wound up under the provisions of the Joint-stock Companies Winding-up Act, 1848; that the said Court considered that it was just and equitable that the said Company should be so dissolved and wound up; and that the said petition was afterwards, and before the making of the said order, on the 27th of April, 1849, advertised in the London Gazette, and duly served at the office of the Company upon the secretary; and that afterwards, and before the 15th of August, 1849, by a certain order of the said Court of Chancery, it was ordered that the said Company should be dissolved and wound up under the provisions of the said Joint-stock Companies Winding-up Act; and that it should be referred to the Master to wind up the affairs of the said Company; and that by reason of the premises the said Railway Company became and was, from the date of the said last-men-

oned order, absolutely and wholly dissolved. Verification.

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The fifth plea was similar to the fourth, alleging, that, after the making of the said order absolute, the said order absolute was carried in before the said Master; and that, by his direction, advertisements were published in two successive numbers of the London Gazette and in three other newspapers, by which, notice was given that the said Master would, at a day, hour, and place therein mentioned, being a day within fourteen days from the day of the publication of the first of the said advertisements, appoint an official manager of the said Company under the said Joint-stock Companies Winding-up Act; and that afterwards, and within fourteen days from the day of the publication of the said first of the said advertisements, and before the commencement of this suit, the said Master appointed one E. C. official manager of the said Company, who then accepted the said appointment, and became, and was, and is, the official manager of the said Company; and that, since the appointment of the said official manager, no permission whatever had been given by the said Master to the plaintiff to commence or proceed with this action, or any action whatever, against the defendants or against any other person representing the said Company; and that no proof of the plaintiff's debt has at any time been made before the said Master or otherwise. Verification.

General demurrer and joinder.

Raymond in support of the demurrer.—To make the fourth plea good, the order under the 11 & 12 Vict. c. 54, must be a complete discharge of the debt; its effect is not to rid the Company of their liability, but only to authorise stay of proceedings until a certain time: Sects. 50, 52, 53, 58, and 73.

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The fifth plea is framed on 11 & 12 Vict. c. 45, and is bad, for that section is not matter for only for a stay of proceedings; besides, that Act apply to Railway Companies incorporated by Act of Parliament: 12 & 13 Vict. c. 108, s. 1. The 13 & 14 Vict. c. 83, s. 30 (b), which will be relied on by the other side, is prospective only, to render valid proceedings taken after the 14th of August, 1850, when that Act passed; it cannot act retrospectively on proceedings commenced before that date without authority. On this point, he cited *Edwards v. Harcourt* (c), *Hitchcock v. Way* (d), *Marsh v. Harcourt* (e), *Moon v. Durden* (f).

Wordsworth contra.—The 7 & 8 Vict. c. 111,

(a) Which enacts, "That, after the first appointment of an official manager, no creditor or other person shall, except so far as the Master shall permit, have power to commence or to proceed with any action against the official manager, or against the Company, or any other person representing the same, or who is sued as a contributory thereof, until after proof, or exhibiting or making such proof as he may be able, of his debt or demand before the Master, as hereinafter mentioned; and it shall be lawful for any Judge of the Court in which such action shall be pending, upon summons taken out before him for that purpose, to order that all further proceedings in such action shall be stayed until after such proof shall have been made or exhibited before the Master."

(b) Which enacts, "That, notwithstanding the provisions in the Joint-stock Companies Wind-

ing-up Amendment Act, 1847, excepting railway companies incorporated by Act of Parliament from the application of the Joint-stock Companies V. Act, 1848, the said Acts shall nevertheless apply to any railway company incorporated by Act of Parliament in respect of which an order has been made by the Court of Chancery for winding up the affairs of such Company, and to the passing of the Joint-stock Companies V. Amendment Act, 1849, proceedings for winding up the same shall proceed as if the said Acts had been applied on under the Joint-stock Companies V. Act, 1848, and the Joint-stock Companies V. Amendment Act, 1849, to all of them."

(c) 11 M. & W. 595.

(d) 6 A. & E. 943.

(e) 19 L. J., C. P., 2.

(f) 2 Exch. 22.

12 Vict. c. 45, apply to Railway Companies: *Ex parte Barber* (a). [Lord Campbell, C. J.—It will be unnecessary for us to give any opinion on the construction of the 11 & 12 Vict. c. 45, if the 13 & 14 Vict. c. 83, gives validity to previous proceedings.] As to the fifth plea, it is not contended that the plaintiff's right of action is gone; but he must, before he can commence his action, go before the Master and offer proof of his debt: *Thompson v. The Universal Salvage Company* (b), *MacGregor v. Keiley* (c), *Prescott v. Hadow* (d). [Lord Campbell, C. J.—The question is, whether, if an action is commenced against the provisions of the Act, the facts are matter of plea, or merely of application to stay the proceedings.]

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Raymond in reply.

Cur. adv. vult..

The judgment of the Court was now delivered by

LORD CAMPBELL, C. J.—In this case, upon a demurrer to the fourth plea in bar of the action, the question has been raised, whether the dissolution of the Company under the Joint-stock Companies Winding-up Act, 11 & 12 Vict. c. 45, was a bar to the action; and upon the demurrer to the fifth plea, the question is raised under section 73 of the same Act, whether the omission to prove the claim before the Master was a bar. We are of opinion that there ought to be judgment for the plaintiff on these demurrers, the pleas being bad. There is no provision in the statute taking away the common-law remedies for a debt upon a dissolution under the statute; on the contrary, by section 58, it is enacted, that nothing in the Act shall alter or affect the rights or remedies of creditors. And with respect to

(a) 1 Mac. & G. 176.

(c) Ante, Vol. 6, p. 208; 4

(b) Ante, Vol. 6, p. 10; 3 Exch. 801.

(d) 5 Exch. 726.

Exch. 310.

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prohibiting any action after an order for dissolution before the Master under section 73, it is no bar to the action is created, but a suspension made or exhibited; after which the credit berty to proceed with the action, as was decided in *cott v. Hadow*. As the 73rd section provides an adequate remedy for suspension of the action until after application for an order to stay proceedings, full given to all parts of the section, by holding that it may be stayed by a Judge's order until after proof not barred altogether.

Judgment for the p

Trinity Term, 1852.

May 26th.

LOWE v. THE LONDON AND NORTH WESTERN RAILWAY COMPANY.

An action of
 assumpsit for
 use and occupa-
 tion lies against

ASSUMPSIT for use and occupation. Plea assumpsit.

a corporation, where there has been an actual occupation by the corporation, though not contracted under seal; and where a Railway Company have occupied, in the absence of evidence, the Court will presume that they occupied under such a parol contract as the Statute by 8 & 9 Vict. c. 16, s. 97 (a) empowered to enter into.

(a) Which enacts, that "The power which may be granted to any such committee to make contracts, as well as the power of the directors to make contracts on behalf of the Company, may lawfully be exercised as follows; (that is to say),

"With respect to any contract which, if made between private persons, would be by law required to be in writing and under seal, such committee or the di-

rectors may make such contract on behalf of the Company in writing and under the seal of the Company, in the same manner may and shall charge the same:

"With respect to any contract which, if made between private persons, would be by law required to be in writing and under seal, such committee or the directors may

ause was tried before *Jervis*, C. J., at the last assizes for Derbyshire; when it appeared that the plaintiff brought to recover the value of the occupation of his land which adjoined the defendants' railway upon which temporary erections had been placed by the contractors of the line, as dwellings for the workmen. No agreement had ever been made for the occu-

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plaintiff objected at the trial, that, inasmuch as there was no contract under seal, or a contract by two of the directors of the Company under the 8 & 9 Vict. c. 16, s. 1, the action could not be supported. However, the Judge left it to the jury to say whether there had in fact been an occupation by the defendants by means of the erections; and the jury found a verdict for the plaintiff, with costs, 175*l.*, leave being reserved to the defendants to enter a nonsuit.

The writ nisi having been obtained,

the case was argued by Serjt. *Hayes* now shewed cause (a).—The writ is a corporation cannot be bound except by con-

on behalf of the Company, in writing, signed by such one or any two of them, or by one of the directors, and in no other manner may vary or be dispensed with.

In respect to any contract made between private persons, or between a private person and the Company, if made by parol only, and not reduced into writing, and not committed to writing by the directors or the directors of the Company by parol only, and not reduced into writing, and in the same manner may vary or be dispensed with. And all contracts made according to the pro-

visions herein contained shall be effectual in law, and shall be binding upon the Company and their successors and all other parties thereto, their heirs, executors, or administrators, as the case may be; and on any default in the execution of any such contract, either by the Company or any other party thereto, such actions or suits may be brought, either by or against the Company, as might be brought had the same contracts been made between private persons only."

(a) Before *Campbell*, C. J., *Coleridge*, J., *Erle*, J., and *Crompton*, J.

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tract under seal, applies only to *express* contracts, and not to those implied by law. If a lease be made to a corporation, they cannot make a surrender except by deed; but if they accept a new lease, that is a surrender in law of the old lease: Bac. Ab. "Corporation," E. pl. 3. A corporation may sue for use and occupation, where there has been in fact an occupation: *The Dean and Chapter of Rochester v. Pierce* (a), *The Mayor of Stafford v. Till* (b), *The Southwark Bridge Company v. Sill* (c); and there must be a corresponding obligation cast on them if they occupy. The law will imply a liability without seal: *The Mayor of Carmarthen v. Lewis* (d), *Painter v. The Liverpool Gas Company* (e), *Church v. The Imperial Gas Light and Coke Company* (f), *Hall v. The Mayor of Swansea* (g), *Doe d. Pennington v. Tanriere* (h). [Lord Campbell, C. J.—But if a promise is to be implied, must it not be a promise under seal?] It need not be, for the defendants might have bound themselves by two of their directors: 8 & 9 Vict. c. 16, s. 97. The judgment of Parke, B., in *Finlay v. The Bristol and Exeter Railway Company* (i), is in point, and shews that the action lies, where there has been in fact an occupation.—They also cited *Elliott v. Rogers* (k), and *The Copper Miners Company v. Fox* (l).

Macaulay and *Mellor* contra.—None can be bound by an implied promise except those who are capable of contracting by parol: *Lamprell v. The Billericay Union* (m), and here the defendants cannot so contract. [Coleridge, J.—They may contract by two directors. *Erle*, J.—The action of use and occupation rests on a statutory liability—

(a) 1 Camp. 466.

(b) 4 Bing. 75.

(c) 2 Car. & P. 371.

(d) 6 Car. & P. 608.

(e) 3 A. & E. 433.

(f) 6 A. & E. 846.

(g) 5 Q. B. 526.

(h) 12 Q. B. 998.

(i) *Anta*, p. 449; 7 Exch. 40.

(k) 4 Esp. 59.

(l) 20 L. J., Q. B., 174.

(m) 3 Exch. 283.

ing from occupation.] The only presumption against corporation is, that they contracted in the way in which corporations can alone legally contract: *Diggle v. The London and Blackwall Railway Company* (a), *Homersham v. The Wolverhampton Water Works Company* (b), *The Mayor of Ludlow v. Charlton* (c). [Lord Campbell, C. J.—The liability in those cases arose out of express contract, which had been executed; here it arises from occupation, and the law raises the promise. The dictum of *Stoke, B.*, in *Finlay v. The Bristol and Exeter Railway Company*, is express and consistent with *Hall v. The Mayor of Swansea*. Where you proceed for the breach of an executory contract, you must rest on the contract itself; but where the consideration is executed, you may proceed on a promise implied by law.] It is submitted, that there is no difference in this respect between executed and executory contracts: *Church v. The Imperial Gas Light Company*, *Lamprell v. The Billericay Union*.

As to the power of two directors to contract under 8 & 9 Vict. c. 16, s. 97, no such contract ought to be implied: *Cope v. The Thames Haven Dock and Railway Company* (d), *Ridgway v. The Plymouth Grinding Company* (e).—They also decided *Arnold v. The Mayor of Poole* (f), *Paine v. The Guardians of the Strand Union* (g), *Sanders v. St. Neot's Union* (h), *Birch v. Wright* (i).

LORD CAMPBELL, C. J.—I am of opinion that this rule ought to be discharged. The objection is a technical one. It is, that an action of assumpsit for use and occupation cannot be maintained, because the defendants, being a cor-

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(a) Ante, Vol. 6, p. 590; 5 Exch. 841.

(b) h. 442.

(e) 2 Exch. 711.

(c) Ante, Vol. 6, p. 790; 6

(f) 4 M. & Gr. 860.

(d) h. 137.

(g) 8 Q. B. 326.

(e) 6 M. & W. 815.

(h) 8 Q. B. 810

(f) Ante, Vol. 6, p. 83; 3

(i) 1 T. R. 378.

an action might be maintained by a corporation if the land has been occupied by their permission. I think the liability must be reciprocal, so as to charge in like case. But it does not rest upon that alone. We have also the decision in *Hall v. The Proprietors of Swansea*, where it was held that a corporation could be sued in indebitatus assumpsit for the fees wrongfully received by them. It is said, that it is a case of necessity; but there was no more necessity than here—that arising out of the moral obligation upon the corporation to pay its debts. In addition to these authorities, we must pay great respect to what fell from my brother Parke in *Finlay v. The Bristol and Exeter Railway Company*. He there says, that an action will lie against a corporation for the actual use and occupation of land with the consent of the owner. Independently of any general principle of law applicable to corporations, I think we are relieved of any doubt in this case by section 12 of the Companies Clauses Consolidation Act, which gives power to the directors to enter into contracts for the occupation of land necessary for the carrying out the undertaking to complete the railway. Supposing the Company to have had the occupation of the land, why are we to assume that it

COLERIDGE, J.—I am of the same opinion. With respect to the first point it must be taken to be found that there was a use and occupation of this land by the defendants with the permission of the plaintiff. Under such circumstances, in the case of an individual, the law would infer a promise to pay a reasonable compensation; and there is authority for such an action being sustainable in respect of a corporation. The Courts ought not, I think, now to limit the extent of that authority. But in this case we are not driven to come to a decision on that point, because an inference may be drawn sufficient to support the action under the provisions of the Companies Clauses Consolidation Act. If there exists no legal impossibility which prevents a corporation from making a promise, we ought to draw the same inference as we should draw in the case of an individual; and here it appears that the directors of the Company are at liberty to enter into a contract of this nature. Taking it, therefore, either way, and without reference to the authorities, the action is maintainable.

ERLE, J.—The first question raised in this case is, whether evidence of actual occupation by the defendants is evidence to go to the jury in support of this action. I think that it is. I do not propose to advert to the decisions which appear in some degree to conflict, as to whether an action like this will lie against a corporation without proof of a contract under seal. There is, however, the opinion of the Court of Exchequer (in which Court the exemption of corporations has been most strictly maintained,) that an action of assumpsit for use and occupation will lie where there has been an actual occupation by the corporation. But I think that the action is maintainable by reason of the Companies Clauses Consolidation Act, which provides that the directors may exercise such a power as this on behalf of the Company; and

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that, with respect to any contract, which, if made between private persons, would be valid by parol, the directors may make by parol. In the ordinary case of land held by one person with the consent of another, we may infer a contract on the part of the person occupying; and if we can do so in the case of a single occupation, I do not see why we may not do so where several persons occupy. I think, therefore, that the point of law fails the defendants.

CROMPTON, J., concurred.

Rule discharged.

IN CHANCERY.

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THE LORD CHANCELLOR COTTENHAM, LORD CHANCELLOR
TRURO, AND THE LORDS JUSTICES.

1850.
Feb. 19th,
20th, & 23rd.

1851.
Nov. 25th.

SHREWSBURY AND BIRMINGHAM RAILWAY COMPANY v.
LONDON AND NORTH WESTERN RAILWAY COMPANY,
THE SHROPSHIRE UNION RAILWAYS AND CANAL COM-
PANY, G. C. GLYN, and WILLIAM COWAN.

1852.
Nov. 16th &
17th.

1853.
May 27th &
28th.

June 28th.
Two Railway
Companies N.
and S. (the de-
fendants,) soli-

A bill was instituted by the plaintiffs in order to
obtain the specific performance of an agreement, by which

Parliament authorised the N. Company to take a lease of the undertaking of the S. Company, which consisted of three distinct lines of railway. The plaintiffs opposed the bill; an agreement having been entered into between the three Companies, the plaintiffs withdrew their objection, and the bill passed into an Act, empowering and requiring the S. Company to lease the N. Company, and the N. Company to accept, a lease in perpetuity of all the S. Company's undertaking. An agreement under the corporate seals of the three Companies was then executed; by the first clause the Companies N. and S. undertook, during the continuance of the lease, to keep an account of the traffic from Shrewsbury and Wellington to Rugby, or any place to the south of Rugby. By the second clause, they undertook to furnish the plaintiffs with half-yearly accounts of the traffic. By the third clause, they undertook not to convey anything from Shrewsbury or on, or from any point between those two places to any point on the line of the plaintiffs' or the Stour Valley Railway, or to use the line by Gnosal and Stafford to compete for any traffic which properly belonged to the plaintiffs. By the fourth clause, it was stipulated that the bill should not be evaded by any device, and that any questions arising from it should be referred to the arbitration of R. S. And by the fifth clause, the plaintiffs were to have liberty to rescind the agreement by a six months' notice. One line only of the three railways projected by the Act was completed, and no lease was executed pursuant to the Act; the defendants contending that the time for granting a lease had not arrived until the completion of the three railways. The plaintiffs opened their line of railway in 1849, and applied to the defendants to execute the terms of the agreement; which application not being acceded to, the plaintiffs filed their bill for specific performance, and praying an injunction to restrain the defendants from carrying on, or conveying, cattle, or goods between the specified points, and from using their railway between Gnosal and Stafford to compete with the plaintiffs' traffic. Demurrers were put in to this bill, and were allowed by the Vice-Chancellor. Lord Cottenham, L. C., reversed that decision; whereupon the defendants obtained an injunction. Lord Truro, L. C., on motion after answer, discharged the injunction granted by the Vice-Chancellor, with liberty to the plaintiffs to bring such action as they might think fit, both parties undertaking to keep all the required accounts. An action was brought by the plaintiffs in the Court of Queen's Bench; the declaration was demurred to, and the demurrer was upon argument overruled. The cause then came on for hearing before the Master of the Rolls, who dismissed the bill, and refused to make any order upon a renewed motion for an injunction. The Lords Justices on appeal confirmed the order of the Master of the Rolls, and dismissed the bill, but without costs.

The Vice-Chancellor, that, no lease of the undertaking having been executed, the agreement was not to come into operation.

By Lord Cottenham, L. C., that the time for granting a lease of each distinct line arose upon the completion of each line, and that the agreement was binding.

By Lord Truro, L. C., that the injunction, granted in aid of an alleged legal right before the completion of the line, not being required for the protection of the plaintiffs against irremediable mischief, be dissolved; with liberty to bring an action.

By the Court of Queen's Bench, that the agreement was not void at law.

By the Master of the Rolls on the hearing, that the time when the agreement was to come into operation had not arrived, and that the bill be dismissed.

By Knight Bruce, L. J., on appeal, that, independently of the Leasing Act, the agreement

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the through-traffic from Shrewsbury to Rugby and south to London, was to be divided between the plaintiffs and defendants in certain proportions, and by which the defendants agreed not to carry any traffic between Shrewsbury and Birmingham, viâ Stafford, in competition with the plaintiffs.

The original bill was filed on the 17th of December, 1849, by the above-named plaintiffs against the London and North Western Railway Company; the Shropshire Union Railways and Canal Company; and G. C. Glyn, a shareholder, and member and chairman of the board of directors of the London and North Western Railway Company; and William Cowan, the secretary of that Company(a).

The bill stated that all the undertakings of the Trent Valley Railway Company, and also of the Birmingham, Wolverhampton, and Stour Valley Railway Company, had been, under the powers contained in the Acts of Parliament incorporating or relating to those Companies, leased in perpetuity, and worked and used by the London and North Western Railway Company.

(a) The following Acts were referred to in the bill:—The Shrewsbury and Birmingham Railway Act (9 & 10 Vict. c. cccvii.); the London and Birmingham Railway Act (3 Will. 4, c. xxxvi.); the Grand Junction Railway Act (3 Will. 4, c. xxxiv.), and an Extension Act (4 Will. 4, c. lv.); the Manchester and Birmingham Railway Act (1 Vict. c. lxix., and the 2 & 3 Vict. c. lxix.); the Trent Valley Railway Act (8 & 9 Vict. c. cxii.); and also the London and North Western Railway Act (9 & 10 Vict. c. cciv.); the Stour Valley Act (9 & 10 Vict. c. cccxxviii.); the 10 & 11 Vict. c. cxxi., inti-

tuled "An Act to authorise a lease of the undertaking of the Shropshire Union Railways and Canal Company to the London and North Western Railway Company;" the Shropshire Union Railways and Canal Act (9 & 10 Vict. c. cccxxii.), and Extension Acts connected therewith, (9 & 10 Vict. chaps. cccxxiii. and cccxxiv.); and also a certain other Act of Parliament (10 & 11 Vict. c. clxxxviii.), intituled "An Act for enabling the London and North Western Railway Company to make a branch line of Railway from Portobello to Wolverhampton, and for other purposes."

was beyond the powers of the directors, and a breach of trust as between them and their shareholders.

Held by Turner, L. J., that the time for granting a lease of one line of the three Shropshire Union Railways arrived on the completion of that line; but that the agreement was beyond the powers of the contracting parties, and could not be enforced by a Court of equity.

That the Shropshire Union Railways and Canal Company had been incorporated by Parliament, upon the ground, among other things, that the lines of railway which they were authorised to make would, if made, be beneficial to the public as competing with the London and North Western Railway Company.

That, in 1847, the London and North Western Railway Company applied to Parliament for the purpose of obtaining an Act to enable them to take and accept, and the Shropshire Union Railways and Canal Company to grant, lease of the undertaking of the latter Company; and inasmuch as the London and North Western Railway Company would, in the event of their having obtained such lease, have commanded the whole traffic between Shrewsbury and Birmingham to the destruction of the plaintiffs' Company, they opposed such application; and, in consequence of such opposition, a negotiation was opened, and on the 13th of May, 1847, an agreement was made and entered into between the two Companies in the following words:—

“That all traffic up and down between Shrewsbury or Wellington or intermediate stations and Rugby, or any point on the London and North Western Railway to the south of Rugby, shall be kept separate, and divided between the two Companies in proportion to the mileage travelled over each of the lines of the Shrewsbury and Birmingham and Shropshire Union Companies; such joint account and division, however, to be optional with the Shrewsbury and Birmingham Company. This arrangement to include all the London traffic, by whatever route may pass.

‘Secondly. That the Shropshire Union Company, or London and North Western Company, shall not, during the continuance of such joint account and division of traffic, convey from Wellington, or any part of their lines westward of Wellington, any goods or passengers to any part

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"That all traffic up and down between Shrewsbury or Wellington or intermediate stations and Rugby, or any point on the London and North Western Railway to the north of Rugby, shall be kept separate, and divided between the two Companies in proportion to the mileage travelled over each of the lines of the Shrewsbury and Birmingham and Shropshire Union Companies; such joint account and division, however, to be optional with the Shrewsbury and Birmingham Company. This arrangement to include all the London traffic, by whatever route it may pass.

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and any question as to the construction of the t
left to Mr. R. Stephenson."

That, in consequence and consideration of s
ment, the plaintiffs withdrew their opposition; i
upon an Act of Parliament was passed (10 &
cxxi.), intituled "An Act to authorise a Lease
dertaking of the Shropshire Union Railways i
Company to the London and North Western
Company;" which—after reciting, among other t
three Acts of Parliament had been passed, call
tively the Shropshire Union Railways and Cana
bury and Stafford Railway Act; the Shropsh
Railways and Canal, Newtown to Crewe, with
Act; and the Shropshire Union Railways and Ca
ter and Wolverhampton Line Act (a)—enacted
the completion of the works of the railways b
recited Acts authorised to be made, so as to
for public traffic, or at such earlier period as may
upon between the said Companies, the Shropal
Railways and Canal Company shall and they
empowered and required to grant, and the L
North Western Railway Company shall and the
by empowered and required to accept, a lease in
of the *undertaking* of the said Shropshire Union

eight of the directors of the Shropshire Union Railways and Canal Company, and eight of the directors of the London and North Western Railway Company.

By the 8th section it was provided, amongst other things, 'that the said joint committee shall have and exercise all powers in relation to the execution and completion of the said Railways and the works connected therewith, and for and in relation to the management of the said railways, when and as the same shall be completed, which, if this Act had not been passed, might have been exercised by the directors of the Shropshire Union Railways and Canal Company.'

By the 11th section it was enacted, "that, when and as each of the said railways shall be completed and opened, the same shall be worked and used by the London and North Western Railway Company, who shall observe all such directions in relation thereto as the joint committee shall make, consistently with the provisions of this Act and of the lease to be granted in pursuance thereof; and for the purposes of such working and use, the said London and North Western Railway Company, and their officers, agents, and servants, shall have, use, and exercise all such powers and privileges in relation to every such completed railway, as were granted to the Shropshire Union Railways and Canal Company, and their officers, agents, and servants, by the Act authorising them to maintain and work and use such railway, and as if the name of the London and North Western Railway had been inserted in such Act in lieu of the name of the Shropshire Union Railways and Canal Company, and so from time to time as each of the said railways shall be completed."

By the 19th section it was enacted, "that, when any one of the said railways shall have been completed before the completion of all such railways, then and in each such case the amount of the share capital which shall have been raised and expended for the formation of such railway

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shall be ascertained; and thenceforth until the completion of all the said railways a rent shall be payable by the London and North Western Railway Company to the Shropshire Union Railways and Canal Company, equal to interest after the rate hereinbefore stipulated on the share capital which shall have been so raised and expended for the formation of such completed railway, and on the money, if any, borrowed for such formation, and on the whole of the canal capital of the said Shropshire Union Railways and Canal Company; and when another of the said railways shall be subsequently completed, such rent shall be increased by interest after the stipulated rates on the share capital raised and expended, and the money borrowed, if any, for the formation of such other railway," &c.

By the 24th section it was provided, "that, until the lease of the said railways hereby authorised shall be completed," all the profits derived from so much of the canals, &c. should be applied in a particular manner.

By the 25th section it was enacted, "that, after making the lease hereby authorised to be made, and notwithstanding such lease, so much of the canals, and works, and property connected therewith of the Shropshire Union Railways and Canal Company, or so much of such canals, works, and property as shall not be converted into or used for the purposes of the said railways or any of them, shall continue to be managed and worked under the direction of the said joint committee in the name of the Shropshire Union Railways and Canal Company; but all the net profits to be derived from such canals, after defraying the expense of working and managing the same, shall be added to and accounted as part of the profits of the said undertaking."

The 31st section enacted, "that it shall not be lawful for the said Shropshire Union Railways and Canal Company, by virtue of the powers hereinbefore contained, to demise or lease, nor for the said London and North Western Railway Company to enter into or accept such lease

the undertaking of the first-mentioned Company, unless it shall have been proved to the satisfaction of the Commissioners of Railways, and certified by them under their seal previously to the execution of such lease, that one-half of the whole amount of the capital, exclusive of moneys, by the Act or Acts relating to each of the said Companies authorised to be raised, has been actually paid up and expended for the purposes authorised by such Act or Acts respectively."

That, shortly after the passing of the last-mentioned Act of Parliament, and on the 12th of October, 1847, certain articles, under the respective corporate seals of the Shrewsbury and Birmingham Railway Company, London and North Western Railway Company, and the Shropshire Union Railways and Canal Company, were executed by the several Companies; and such articles of agreement are in the following terms:—

"Articles of Agreement, made this 12th day of October, 1847, by and between [the plaintiffs] of the one part, and [the defendants] of the other part.—Whereas, the line of railway in course of formation between Shrewsbury and Wellington is common to the said Shrewsbury and Birmingham Railway Company, and the said Shropshire Union Railways and Canal Company, and is under the direction and control of a joint committee of management. And whereas a bill was introduced into Parliament during the last session for authorising a lease in perpetuity of the undertaking of the said Shropshire Union Railways and Canal Company to the said London and North Western Railway Company, and the same was opposed by the said Shrewsbury and Birmingham Railway Company. And whereas the said (a) *Shrewsbury and Birmingham Railway Company agreed to withdraw their opposition to the said*

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(a) The words in italic were inserted, or substituted for other words, in the draft articles by the solicitor of the Shropshire Union Company when submitted to him for approval.

last session of Parliament: Now, therefore, these witness, and it is hereby mutually covenanted, and agreed by and between the said several (parties hereto: the said London and North Wes way Company and Shropshire Union Railways: Company covenanting and agreeing for them and in respect of their own acts and deeds only said Shrewsbury and Birmingham Railway Co venanting and agreeing for themselves for and of their own acts and deeds only, and not the on ing party for the acts and deeds of the other c party, as follows, that is to say:—

“ Firstly. That the said Shropshire Union Rai Canal Company, or the London and North Wes way Company, shall and will, from time to time times hereafter, during the continuance of any authorised to be granted by such Act, make an separate and distinct account of all passengers, c gage, goods, and other matters and things, w Companies, or either of them, shall carry or co Shrewsbury or Wellington, or from any point betw two places, to Rugby or to any place to the sout the London side of Rugby, on the line of the L North Western Railway Company, and also of:

also a like separate and distinct account of all sums of money, which such last-mentioned Companies her of them shall receive for the carrying or conveyance of all passengers, cattle, luggage, goods, and other matters and things whatsoever, of or respecting which they are to keep such separate and distinct accounts as aforesaid.

And the said Shrewsbury and Birmingham Railway Company shall and will, in like manner, and during the period, make out and keep a separate and distinct account of all passengers, cattle, luggage, goods, and other matters and things, which such last-mentioned Company convey or carry from Shrewsbury or Wellington, or any point between those two places to Rugby or any point to the south of or on the London side of Rugby, upon the line of the said London and North Western Railway Company, or to London, either upon the said last-mentioned line or upon that of any other Company; and a like separate and distinct account of all sum and sums of money which the said Shrewsbury and Birmingham Railway Company shall receive for the carrying or conveyance of such passengers, cattle, luggage, goods, and other matters and things, of or respecting which they are to keep such separate and distinct accounts as aforesaid.

Secondly. That the said Shropshire Union Railways Canal Company, or the said London and North Western Railway Company on the one part, and the said Shrewsbury and Birmingham Railway Company on the other shall respectively, from time to time, make out and deliver to the other of them a half-yearly account, in abstract, of all the matters mentioned and comprised in the first article or clause; which accounts shall be subject to be audited by the respective auditors, for the time being, of the said hereby contracting Companies; and all the accounts mentioned in the first article or clause shall be open at all reasonable times to the inspection of the directors of either of the said contracting Companies, or of any persons duly authorised by them; and it shall, from time

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"Thirdly. That, during the continuance of the lease as aforesaid, the said Shropshire Union Railways and Canal Company and London and North Western Railway Company, or either of them, shall not nor will they carry any passengers, cattle, luggage, goods, or other articles or things from Shrewsbury or Wellington to any point between those two places, to any point

any manner be evaded or eluded by either of the contracting parties; nor shall any arrangement, scheme, device, or contrivance, be resorted to or attempted for that purpose; and in case any attempt shall be made by either of the contracting parties to evade or elude the arrangement hereby made, or in case any question or dispute shall arise between the contracting parties on the import or construction of these articles or any matter herein contained, the same shall be referred, at the request of either of the said Companies, to the arbitration and determination of Robert Stephenson, Esq., and in case of the death or absence of the said Robert Stephenson, then to the arbitration and determination of an umpire to be appointed by the Railway Commissioners or other Government Board entrusted with the supervision of railways, in case of the said parties hereto, their successors or assigns, not agreeing in the nomination of such umpire.

"Fifthly. Provided always, that, notwithstanding anything hereinbefore contained, it shall be lawful for the Shrewsbury and Birmingham Railway Company to determine and put an end to this agreement at any time, by giving six calendar months' notice, in writing, of such their intention to the Shropshire Union Railways and Canal Company, such notice terminating either on the 30th June or 31st December, whichever of those days shall first happen after the expiration of such six months; and thenceforth this agreement, and every clause, matter, and thing herein contained (except in respect of any breach thereof then already committed), shall cease and be at an end.—In witness," &c.

The bill further stated, that the several lines of railway from London to Stafford viâ Rugby and Tamworth, and from Rugby to Birmingham, and from Birmingham to Stafford viâ Portobello, and from Shrewsbury to Wellington, and from Wellington to Stafford viâ Gnosal, had been completed and in use prior to October, 1849; and that the whole of such lines were the property of, or leased

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tiffs' station at Wolverhampton.

That, on the 20th of October, 1849, the plaintiffs called on the defendants, by letter, to keep the accounts in terms of the agreement. The defendants, the Shropshire Union Company, by their secretary, answered, in part as follows: "I do not consider that the agreement of the 12th of October, 1847, comes into operation upon the opening of the Shrewsbury and Birmingham line to Wolverhampton. As, however, the line of this Company is now worked by the London and North Western Company under the provisions of the Leasing Act, I have been instructed to forward your letter to the secretary of that Company."

That the plaintiffs opened their line of railway from Wellington to Wolverhampton on the 13th of November 1850; from which time they commenced carrying goods &c. to and from Shrewsbury and Wolverhampton, and from Wolverhampton and Birmingham, and also from their station at Wolverhampton to the Wolverhampton station of the London and North Western Railway Company, which was at Portobello, about one mile distant from the plaintiffs' station; but that they were unable to carry any passengers, &c. from Shrewsbury to Wellington, or any intermediate point, to Rugby or L

of the benefit of the agreement, had neglected to keep accounts, and carried passengers, &c. from Shrewsbury and Wellington to Wolverhampton and Birmingham Stafford and Portobello, and vice versâ, contrary to agreement, and were carrying such passengers, &c. at rates of fare as to prevent the plaintiffs in any way competing with them.

The bill charged that the defendants ought to keep the amounts provided for by the articles of agreement, and not to carry any passengers from Shrewsbury or Wellington, or from any point between those two places, Wolverhampton or Birmingham, or vice versâ.

That if no formal lease by deed, of the Shropshire Union Railways and Canal Company, had then been executed, the articles of agreement had nevertheless come into operation; for that the line of railway from Shrewsbury to Stafford had long been completed, and had been used and worked by the London and North Western Company under the authority of the Act of Parliament; and that, in such Act of Parliament had operated as a lease of the line between Shrewsbury and Stafford.

That it was no part of the agreement that it should not be put into operation, as pretended by the defendants, until the line of railway between Wolverhampton and Birmingham, and the connection between Portobello and the plaintiffs' station at Wolverhampton, had been made.

That the London and North Western Railway Company, by the terms of their lease with the Stour Valley Railway Company, bound to complete the Stour Valley line, which comprised the connection between Portobello and the plaintiffs' station at Wolverhampton.

That it was in consideration of the defendants entering into the agreement, that the plaintiffs had been advised to withdraw their opposition to the proposed Act for granting a lease of the Shropshire Union Railways and Canal Company's undertaking to the London and North Western Company; and that, if the plaintiffs had not with-

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drawn their opposition, the defendants would not have been able to have obtained their Act of Parliament.

The bill then prayed, in the terms of the first and second clauses of the articles of agreement, that the defendants might be directed and decreed to perform them specifically; and it also prayed an injunction to restrain the defendants from conveying or carrying any passengers, &c. from Shrewsbury or Wellington, or from any point or place on the line of the plaintiffs' railway, or the Birmingham, Wolverhampton, and Stour Valley Railway, or using the line of the Shropshire Union Railway by Gnosal or Stafford, to compete for any traffic which properly belonged to the plaintiffs.

No formal lease of any part of the undertaking of the Shropshire Union Railways and Canal Company had in fact been executed by that Company to the London and North Western Railway Company; and it was alleged by the bill that the defendants did not intend to grant or accept a lease.

Each of the defendant Railway Companies put in a demurrer to the bill for want of equity, and the same came on to be argued before the Vice-Chancellor of *England*.

Mr. *Bethell* and Mr. *Follett*, in support of the demurrers, contended—That it was admitted that the general policy of the legislature was to have competing lines; and if that object was defeated by the present agreement, then the Court would hold the agreement to be invalid. That it could not be supported, inasmuch as it created a species of partnership between two Companies, the traffic within certain limits being made a common stock, and for that purpose completely mingled together, and there being a stipulation that there should be no competition between the Companies. That an agreement of this sort was wholly extra vires, and could not be enforced. That the funds of a Company were applicable only to the purposes contemplated and authorised by their Act; and that they

d not be expended or applied for any other purpose, although such purpose might be ancillary to the original one: *van v. The Eastern Counties Railway Company* (a), *usch v. Irving* (b). That the throwing their funds into common purse with another Company amounted to a destruction of identity. That such a proceeding was an offence at common law; for it was illegal for a Company to assume the rights of a corporation in respect of matters to which its corporate rights did not extend. That the suit was defective for want of parties: *Richardson v. Larpent* (c). That it required the especial consent and authority of Parliament to enable one line to connect itself with another by means of a crossing; and, in the Act in question in this cause, there was a special provision as to a part of the line which was to be used in common by the two Companies, clearly demonstrating that such an amalgamation or partnership as was contemplated by the agreement was not *vires*. Again, that, by the regulations of the general Act (d), Railway Companies were compellable to keep their accounts in a certain manner; but, if the agreement was to be carried into effect, the funds of the two Companies were, as to a portion, to be blended, and the provisions of the Act could not be applied. They also contended that the time had not arrived for the enforcement of the contract; that no account had been or could be taken; that the agreement was prevented from taking effect by the want of legislative enactment to bring it into existence; that, even under the terms of the agreement itself, the lease was not to be granted until all the works had been completed, of which possession was to be delivered over to the defendants. That a Railway Company were bound to carry passengers wherever their line extended, and that an injunction to restrain the Company from carrying passengers would be against legislative enactment.

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a) Ante, Vol. 4, p. 513.

(c) 2 Y. & C. C. 507.

b) Gow on Partnership, App.,

(d) 8 & 9 Vict. c. 20, s. 107.

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Mr. *Willcock*, for the Shropshire Union Railways and Canal Company, contended—That the agreement was extra vires; that it would in fact be an amalgamation of the two Companies without the authority of Parliament; and that the bill was premature.

Mr. *Rolt*, Mr. *Malins*, and Mr. *Hardy*, for the plaintiffs, in support of the bill, contended—That this agreement was a matter of private arrangement between the Companies as to certain local traffic; but with respect to the through traffic, each Company was to have its fair share of the proceeds; that, if such an agreement was a fraud upon Parliament, all agreements by which any interchange of conveniences was effected between Railway Companies were frauds upon it. That the cases of *Edwards v. The Grand Junction Railway Company* (a), *Stanley v. The Chester and Birkenhead Railway Company* (b), *Simpson v. Lord Howden* (c), *Greenhalgh v. The Manchester and Birmingham Railway Company* (d), all shewed that such a view was contrary to that taken of similar contracts by Courts of equity. That an agreement between parties, to take effect on the approval of Parliament, was perfectly valid. That at the time for deciding the validity of the agreement was at the hearing and not on demurrer. That parts of the agreement were at all events to be executed; and therefore, that there was sufficient to sustain the bill against the demurrers. That when two lines of rail ran to the same point, and there was an agreement to divide the traffic, such an agreement was not a partnership, but a mere arrangement as to the mode of carrying on the concerns of both Companies—a mere matter of regulation of traffic. That, in the cases of *Natusch v. Irving*, and *Colman v. The Eastern Counties Railway Company*, there was an attempt to involve the shareholders in new liabilities; but, in the present case, the responsibilities of the shareholders would

(a) Ante, Vol. 1, p. 173.

(b) Id. p. 58.

(c) Ante, Vol. 1, p. 326.

(d) Id. p. 68.

reased. That all the Companies were sui juris, and respective members agreed to enter into this arrange-

That there was no destruction of the corporation, a mortgage or sale of the corporate property had place; but what was done had been done for the use of promoting it. That the leasing Act was to be in reference to the articles of agreement, and to be read accordingly. That the memorandum of agreement did not specify when the lease was to come into operation; and that it was clearly understood it was to come into operation at once on the passing of the Act. That the Act was in fact the lease, the words of which were in the present tense, "*are* required to grant," &c.

Bethell, in reply, after commenting on the Act of Parliament, contended—That the Court, being a public tribunal, must consider the legality or illegality of the agreement. That there was no allegation in the bill that a lease had been granted. That the bill prayed a performance of the agreement, whereas it was clearly contemplated that one lease only should be granted of all the railways comprised in the undertaking. That, in fact, the Company was not in a condition to grant, nor the Government to receive, any lease; and that the condition on which a lease was to be granted, had not yet been fulfilled.

The VICE-CHANCELLOR allowed the demurrers, on the ground, that, although the Act of Parliament contained provisions for a lease, the time had not arrived at which a lease was to be granted (*a*).

The demurrers were again argued, by way of appeal, before the Lord Chancellor (*Cottenham*).

Rolt, Mr. *Malins*, and Mr. *Hardy*, in support of the demurrers.

The grounds on which the Lord Chancellor refused the demurrers are stated more fully in the judgment of the Lord Chancellor, post, pp. 552 et seq.

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Mr. *Bethell* and Mr. *Follett*, for the defendants the London and North Western Railway Company; and

Mr. *Willcock* for the Shropshire Union Railways and Canal Company.

Mr. *Malins* replied.

The LORD CHANCELLOR (*a*).—These were demurrers by the London and North Western Railway Company, and the Shropshire Union Railways and Canal Company, to a bill filed by the Shrewsbury and Birmingham Railway Company, seeking the performance of an agreement entered into between these three Companies. The Vice-Chancellor allowed the demurrers, upon the ground, as he stated, that the time was not come at which the plaintiffs had a right to raise the question on that agreement, that is to say, that the time had not arrived when the agreement was to come into operation.

Several other grounds, however, were raised on the argument of these demurrers before me, in which it was contended, that they might properly be allowed, even if the objection on which the Vice-Chancellor proceeded was not considered as being sufficient ground for that purpose. It was contended, that the contract was a fraud on Parliament; that the Company had not power to do that which they have agreed to do; and that the arrangement was inconsistent with the duty which they owed to the public and to their own subscribers; in short, that it was an undertaking to do that which they have no right to do, and therefore a contract which the Court would not carry into effect.

Now, the short history of the transactions which led to this agreement was simply this, and a very short statement will be sufficient to explain the grounds on which my opinion has been formed:—The railway which the plaintiffs have made, and which was the foundation of the agreement, was a railway from Shrewsbury to Wolverhampton.

(*a*) Lord Cottenham.

other Company, the Shropshire Union Railways and Canal Company, had also a railway to make from Shrewsbury to Stafford. The first part of the line, namely, from Shrewsbury to Wellington, is a line common to the two. At Wellington the two lines diverge; the plaintiffs' line proceeding to Wolverhampton, the line projected by the defendants' Company proceeding to Stafford, and there joining the London and North Western Railway. There was also a line from Rugby to Birmingham made, but there was no direct line of railway from Birmingham to Wolverhampton. That had been projected, and it is sufficient for the present purpose that the London and North Western Railway Company, according to the allegation in the bill, had, by a lease obtained from the parties who had projected that railway, become liable to perfect it, with power afterwards of using it. Partly, therefore, by acquisition of title from others, and partly by the duty which they had undertaken to perform—as the bill alleges—they might and ought to have completed the line. If that line were completed, there would be a continuous railway from Shrewsbury to Rugby, making a shorter line than the one to Rugby from Shrewsbury or Wellington by the London and North Western Railway. Consequently, if other matters were equal, and the fares were in proportion to the distance, there would be a strong inducement to the public going from Shrewsbury to Rugby to proceed by that line of which the plaintiffs' railway formed part, instead of going round by Stafford, which would bring them to the same point after a longer distance and a large curve.

The London and North Western Railway Company was desirous of obtaining a lease from the Shropshire Union Railways Company of several schemes which they had in contemplation, and for which they had obtained Acts; and it must be recollected that the line between Shrewsbury and Wellington was a part of their adventure, and that the line from Rugby to Birmingham was a part of their adventure which they had in common.

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with the plaintiffs' railway, and which for that distance, under arrangements, was made and worked by those two Companies in common. The project of the London and North Western Railway Company obtaining a lease of the scheme in progress by the Shropshire Union Railways and Canal Company was opposed, and naturally enough opposed, by the plaintiffs in Parliament, because it was conceived that opening the line from Shrewsbury to Stafford would obviously be a means of carrying passengers and goods from Shrewsbury to Rugby, though not by the shortest way, yet by a way which, being under the control of so powerful a Company as the London and North Western Company, would be very likely to interfere with the business of the plaintiffs' railway. They, therefore, opposed this in Parliament. It was then arranged upon conditions—(I am now speaking of the language of the agreement set out in the bill)—that, in consideration of their withdrawing their opposition, and therefore permitting the London and North Western Railway Company to obtain a bill enabling them to take a lease of the schemes of the Shropshire Union Railways and Canal Company, certain arrangements should be made between the London and North Western Company and the other Company and the plaintiffs' Company. The agreement for that purpose (which is the agreement sought to be performed by the bill, the bill also seeking to restrain any acts inconsistent with the undertaking and duties which the London and North Western Company and the other Company have imposed on themselves by this contract) recites, that a line of railway was in the course of formation between Shrewsbury and Wellington, in common for the Shrewsbury and Birmingham Railway (that is, the plaintiffs' railway) and the Shropshire Union Railways and Canal Company, and under the direction and control of a joint committee of management. It then recites, "that a bill was introduced into Parliament during

the last session, for authorising a lease in perpetuity of the undertaking of the said Shropshire Union Railways and Canal Company to the said London and North Western Railway Company; the same was opposed by the Shrewsbury and Birmingham Railway Company." It then recites, "that the Shrewsbury and Birmingham Railway Company agreed to withdraw their opposition to the said bill, on its being mutually arranged and agreed between the said several Companies that the covenants and agreements hereinafter contained should be mutually entered into by them, on an Act of Parliament being obtained for authorising such lease as aforesaid, or a lease between the same parties of any part of the said undertaking" (in the singular number again) "between Shrewsbury and Stafford." It then recites that the Act (a) had passed in the last session of Parliament; and then there came the covenants and agreements to which I shall have occasion presently to refer.

Now, adverting in the first instance to the objection which was felt by the Vice-Chancellor, and to the ground on which he allowed the demurrers, namely, that the Act of Parliament (a) contained provisions in fact for a lease, but that the time had not arrived at which that lease was to be granted; that Act recites three other Acts, the three other Acts being schemes of the Shropshire Union Railways and Canal Company. It recites the 9 & 10 Vict. chaps. cccxxii., cccxxiii., and cccxxiv. The chapters cccxxii. and cccxxiv. relate to matters not immediately connected with this arrangement between the plaintiffs' railway and the London and North Western; but chap. cccxxiii. does, inasmuch as that is the Act under which the line was to be completed from Shrewsbury to Stafford. The other two relate to other schemes and other places not immediately affecting this transaction; one, indeed, totally unconnected with this transaction, but neither directly interfering with

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(a) 10 & 11 Vict. c. cxxi.

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that there was no intention, no contract between parties for a lease of any one of these railways until the whole was in abeyance until all the railways were completed, and then that there was to be a lease of the whole; and there being no proof that any one of these three projects had been completed, except one from Shrewsbury to Stafford, he was of opinion that the time had not arrived at which the plaintiffs were to put this contract in force.

Now, certainly, looking through this Act of 1825, there is very great confusion of language, and it is found there well calculated to raise doubts and difficulties; but my construction of that Act is (1) that an actual lease could or could not be granted is not that all the rights and liabilities arose on each railway as soon as that particular railway was completed, and that there was no suspension of the obligations of lessors or lessees till the whole was completed. It would be, indeed, a very strange thing if that had been the intention, because, the undertaking being totally distinct, it would be extremely inconvenient to have the obligations on each particular railway dependent on the completion of another railway which had no connection with the one proposed to be completed. Nor is the word used is *lease*, as if there was to be *one* lease, a

or at such earlier period as may be agreed upon between the said Companies, the Shropshire Union Railways and Canal Company shall, and they are hereby empowered and required to grant, and the London and North Western Company shall, and they are hereby empowered and required to accept, a lease in perpetuity of the undertaking" (in the singular number) "of the said Shropshire Union Railways and Canal Company at a rent." Then it proceeds to describe the terms on which they are to be paid, on which observations were made, into which, in the view I take of the case, I do not think it necessary to inquire. Here there are three distinct works, a lease is proposed to be made "on the completion of the works of the said railways" in the plural, and then it is to be "a lease in perpetuity of the undertaking" in the singular. That of itself is sufficient, in the commencement of an Act of Parliament, to raise considerable difficulty in putting a construction on its meaning. But there are subsequent clauses which appear to me to leave no doubt that the rights and liabilities of the parties were to arise upon the completion of each of those works, so far as that particular work was concerned. And the 11th clause is very strong for that purpose. There are several clauses which I do not think it is necessary particularly to advert to, but those that are strongest I will shortly state. By the 11th clause it is enacted: [His Lordship then read the 11th section (a).] In that section there is a provision which makes the relative situation of landlord and tenant to arise as to each railway, upon each being completed; and on looking at that section alone, it would appear, that although the actual lease was to be postponed till the railway was completed, yet, that the relative situation of these particular parties, quoad that particular railway so finished, was to commence on that particular railway being completed, the directors who are to have the management being directed to conduct that management

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(a) Ante, p. 535.

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consistently with the provisions of the Act and of the lease to be granted in pursuance thereof; so that they are to look at the lease. Whatever effect the provisions of that intended lease are to have with respect to each particular railway so completed, the London and North Western Railway Company are to have possession of it, they are to work it, and if they are to work it they are to pay the consideration in respect of that particular railway so completed which they undertook to pay to those from whom they took it; and the terms are, that it shall be done "consistently with the provisions" of the lease to be granted in pursuance thereof. It is obvious either that there was to be, or might be, a separate lease for that particular railway, or that the whole was intended to be comprised in one lease. It is singular enough, because the matters are totally and entirely distinct, and have no connection with each other; but it might possibly be that the parties thought proper to have matters so unconnected included in one lease. Be that as it may, whether the lease was to be granted immediately, or postponed till the whole was completed, the London and North Western Railway Company were to have possession. They were to have the working of it, and of course to receive the profits; the management of it was in the meantime to be according to the provisions of the lease to be granted. The relative position, therefore, of landlord and tenant was clearly and distinctly established. Whether the lease was executed or not, could not in this Court make the slightest difference.

Then there are several other sections which it is scarcely worth while to comment on. They were mentioned in the course of the argument, but they all tend to the same construction.

The 31st is, "That it shall not be lawful for the said Shropshire Union Railways and Canal Company, by virtue of the powers hereinbefore contained, to demise or lease, nor for the said London and North Western Railway Com-

any to enter into or accept such lease of the undertaking of the first-mentioned Company, unless it shall have been approved to the satisfaction of the Commissioners of Railways." There are several other similar instances.

The result, therefore, of the Act appears to me to be, that there was no postponement of the rights of the parties to the benefit of the provisions of the lease until the whole was completed; and if there be any doubt on the construction of that Act at all, it would be merely that the lease itself was not to be executed, but that, for all beneficial purposes between the parties, it was to come into operation as to each railway on that particular railway being completed. That being the view I take of the construction of the Act, it would of course dispose of the ground on which the Vice-Chancellor determined this case; because, then, it being a fact stated, and therefore admitted, that that particular line, namely, from Shrewsbury to Stafford, had been completed, the effect is, that the intended lease would come into operation as to that line from the moment that that line of railway was opened.

Then comes the contract made between the plaintiffs and the London and North Western Railway Company, which was in consideration of their not opposing that bill. It is singular enough to observe the language in which it takes notice of that bill and the object of that bill. Suppose the effect of that agreement is adjourned till all the three adventures stated in the preamble of the said bill have been completed—what does this agreement recite? Why, it naturally enough takes no notice of that part of the leasing power, with which they were totally unconnected and had nothing to do. But it does take notice, and takes notice only of that portion of the leasing power by which they were to be affected, for it recites—"Whereas the line of railway in course of formation between Shrewsbury and Wellington is common to the said Shrewsbury and Birmingham Railway Company and

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the said Shropshire Union Railways and Canal Company, and is under the direction and control of a joint committee of management. And whereas a bill was introduced into Parliament during the last session for authorising a lease in perpetuity of the undertaking of the said Shropshire Union Railways and Canal Company to the said London and North Western Railway Company, and the same was opposed by the said Shrewsbury and Birmingham Railway Company." It takes notice, therefore, only of that one line, the one line which, if completed, would come into competition with the plaintiffs' line. It takes no notice at all of the other two lines; but, proceeding in the singular number, referring first of all to that particular and single line that was to affect them, it speaks of authorising a lease in perpetuity of "the undertaking." There were three undertakings in the leasing power, but there was only one that affected the plaintiffs, and that one is the only one referred to in these articles of agreement. It was for not opposing the bill quoad that line that this agreement was entered into. The parties confined themselves to that line which is in terms referred to in the contract, which did affect them both, and in which they were mutually concerned. The contract therefore never could be supposed to be postponed till a lease was obtained of other lines totally unconnected with it, and which were not at all referred to in that contract.

Then it proceeds to recite, as I before mentioned, the Act of Parliament being obtained to authorise "such lease as aforesaid." The only lease referred to as *aforesaid* was the lease of the Shrewsbury and Stafford line, "or a lease between the same parties of any part of the said undertaking between Shrewsbury and Stafford." There you have it in words. It is a lease of the whole of the line between Shrewsbury and Stafford, but it is not connected at all with other lines, although other lines are contained in the leasing Act; and therefore, although, as between the parties,

t Act, no doubt, formed a bond of union, the other railways are not referred to in the agreement as being the consideration for which the parties entered into it. Then it is agreed that the following covenants shall form the consideration for withdrawing the opposition; and the bill having been accordingly passed, the contract is entered into, and the first article of that contract is That the Shropshire Union Railways and Canal Company, or the London and North Western Railway Company, shall and will, from time to time and at all times hereafter during the continuance of any such lease," that is to say, each lease being, as I before stated, the lease relating to the Shrewsbury and Stafford line, and no other—"authorised to be granted by such Act"—the contract then is (I need not read that in detail), that inasmuch as there would then be those two lines, which might be competing lines, and might give rise, and which would give rise, to a struggle for custom, the one carrying passengers from Wellington to Shrewsbury to Rugby by Stafford, the London and North Western Railway Company having that line by virtue of the contract with the lessors of whom they were to take part of that line—the other line being from Wellington by Birmingham to Rugby, there would be those two ways open from Wellington to Rugby, and the natural consequence would be a competition for the purpose of obtaining traffic for those two lines. Both Companies are most anxious to avoid that which might be injurious to both, and therefore they enter into this contract, namely, that accounts should be kept of the traffic—so that there should be no struggle about going by one or the other—that that accounts should be kept of the through traffic which might pass by the one line or the other; and then, having ascertained what that traffic had been, and how far they had travelled upon each of these lines, then they agree to divide the profits arising from such traffic in certain proportions between themselves—seven-thirteenths to one, and six-thirteenths to the other.

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This arrangement is objected to on the ground that it is adverse to the intention of Parliament, and inconsistent with the duties which the directors of those two Companies, or one of them, owed to the public and their constituents: but I shall come to that objection presently.

The London and North Western Railway Company had the means, to a certain extent, of bringing passengers down to Wolverhampton or Birmingham, not by this line, which I have before adverted to, but by another line coming down to Portobello, or coming very near indeed to Wolverhampton and going into Birmingham. They had the means of carrying passengers so as to deposit passengers and goods on the line between Wellington and Rugby. Therefore that was not through traffic, but it was the traffic of persons who were desirous of travelling on part of the distance so covered by these two lines. The contract therefore is, that, with regard to this through traffic, there shall be two accounts taken, and the London and North Western Railway Company should be prohibited from carrying passengers and goods, and depositing them on any portion of the plaintiffs' line terminating at Wolverhampton. But, beyond all doubt, though the line from Wolverhampton to Birmingham had not been completed, that from Rugby to Birmingham had, and that from Birmingham to Wolverhampton was in progress; and therefore they ultimately looked for a clear open line from Wellington to Rugby.

No doubt, if that had not been provided for, the London and North Western Railway Company might have considerably interfered with the traffic on the plaintiffs' proper line, though it would have been a considerable deviation from the shortest line to carry passengers and goods from Wellington up to Gnosall or Stafford, and then down again to Wolverhampton and Birmingham. It might or might not have succeeded; it was, at least, a danger which the plaintiffs' Company were anxious to guard against, and therefore provisions were introduced prohibiting the Lon-

lon and North Western Railway Company from doing that which might be so injurious to the plaintiffs' line.

Having disposed of the ground on which the Vice-Chancellor allowed these demurrers, I will advert to the other objections which were referred to in the argument before me. The first was, that this agreement was a fraud on Parliament. Now I cannot see how that can be so. The matter was in progress before Parliament, and therefore the only fraud practised on Parliament, so far as the parties were concerned in passing the leasing Bill, was, that it had no reference to this arrangement. It was a consideration to one Company for withdrawing their opposition to the bill. It cannot be said that the parties cannot come to a private arrangement between themselves, as a ground for not opposing a bill. The opposition to a bill must be supposed to be for the purpose of guarding the particular interest of the parties opposing. If these objects are attained by any private arrangement, it is no fraud on Parliament. Parliament has no longer the duty of protecting the particular interests which are not brought under their consideration; therefore there is no fraud on Parliament by the party withdrawing his opposition, upon being satisfied that by other means his rights are sufficiently protected. Every landowner with whom arrangements are made before parties go to Parliament—which embraces a large proportion of the whole—have their opposition to the bill neutralised, or destroyed, or withdrawn, in consideration of the arrangement previously made. Therefore, the leasing Bill, so far as it relates to the particular transaction then in progress, does not appear to me to be any violation at all of any duty which the parties owed to Parliament. Still, it is contended, it may be a breach of contract with the Parliament which passed the earlier bill which gave these powers.

Speaking now of this through traffic—what is the effect of this through traffic? That applies as well to

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termini. Now, their duty to their constituents
to say, their subscribers—was, as far as possible,
to themselves, by all lawful means, the most tr
could get. They were apprehensive that they sh
their traffic. They thought that what they ha
reckoned on they would be deprived of; but at
if it was a means by which, according to their
the greatest security was preserved to their subs
getting a fair and reasonable share of that tra
can it be a violation of duty? It is merely a
mode by which that object is secured and obtain
had a right, and they were bound to collect all
sonably could of the fares payable by that traffic
Wellington and Rugby, that being the line of t
way: they are afraid of being deprived of it,

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like, and we will not interfere to persuade them to go one way or the other; when we have ascertained how many have gone one way and how many the other, we then will divide the profits arising from that travelling in certain proportions between ourselves." That was a beneficial arrangement for their own subscribers: their subscribers cannot complain, the duty of the directors being to obtain the most they could. Certainly it must have appeared to them—it appears to me, and must appear to every body—a most advantageous arrangement for the minor Company. In point of fact, it is obvious it was intended as a benefit to them, for the consideration came from them—they paid for it. They object to the Act passing; they object to the leasing power being vested in the London and North Western Company; and then the London and North Western Company say, "we will buy you off; we will purchase off your opposition;" and of course if they do that, it must be supposed that they meant and intended to give, and that the other Company intended to receive, some benefit for the consideration so given. You cannot doubt, therefore, that the plaintiffs' railway obtained a benefit in point of amount beyond what they could naturally reckon on, if they had merely taken what fares they might get by passengers travelling from Wellington to Wolverhampton on their small and limited line of railway. Now, if there is no illegality in this, and if the time has arrived at which the contract is to come into operation, what is the objection to the legality of the agreement?

The other part of the contract is, that they shall not carry passengers, (not on their direct line—it is entirely out of their direct line)—but that they shall not carry passengers from Shrewsbury to Gnosall or to Stafford, there being from Stafford a line actually existing, and from Gnosall a line in contemplation, which might bring the passengers down to Wolverhampton, or might bring them on to Birmingham. It would be very inconvenient,

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and a great detour in point of distance, and must traverse a much greater extent of line than the parties would have to pass along from Wellington to Wolverhampton direct; but still it is possible they might do it. Therefore, it is said, you shall not do that, not interfering with their own direct traffic, but with that indirect traffic which can only be resorted to for the purpose of obtaining from the plaintiffs that which they anticipated as the natural result of the line they established. I see no illegality in that; they were under no obligation to carry passengers in that way. They might or might not choose to have an establishment for carrying passengers on that line; therefore, if it was optional in them whether they would or would not have the communication, it is quite obvious there would be no illegality in making an arrangement with another Company, by which they were to abstain from exercising that power.

Then it is said there is another objection, that this was all in contemplation of the line being continuous and open from Wellington to Rugby; and no doubt, until the line is entirely open, the contract will operate altogether, or nearly altogether, for the benefit of the plaintiffs; because, until that line is entirely open, it will, of course, very much interfere with any traffic from Wellington to Rugby, which the plaintiffs must have reckoned upon. If the plaintiffs reckoned on the line being opened, then they, supplying the railway part of that distance, would of course partake of the benefit of that traffic. But so long as there is a break, there can be no means of going by railway on the direct line from Wellington to Birmingham, although they can get on to that line by going, not to Wolverhampton, but to a station not far from Wolverhampton. There is intended to be a Wolverhampton station, because the plaintiffs' line now runs into Wolverhampton; and when that line is completed from Wolverhampton to Birmingham, there will be a con-

uous line from Wellington to Rugby; that being of course what the plaintiffs reckoned upon when they commenced their proceedings to make the line, and when they entered into this arrangement with the London and North Western Company. Then, have the parties provided for that? The parties have made no provision for that; they have not said this, "the contract shall not take place until that is completed," and for a very good reason, because, if it is not completed, it is not the fault of the plaintiffs, but it is the fault of the defendants, who have the control of the line. They have undertaken that line, and it was their duty to complete it. The bill alleges they might have done, or ought to have done it. Whether they ought was not very material, but beyond all doubt they might; and it is now stated to be nearly in a state of completion. However, I do not proceed upon that. There is no such allegation in the bill; but, at all events, it is under their control. It is that which they have undertaken to do, and they cannot say, we have not completed that which we undertook to complete, and therefore the plaintiffs' contract shall not commence or be in operation until we have performed our duty. That is obviously an argument which cannot for a moment be maintained.

It appears to me, therefore, that this is an attempt to exclude the plaintiffs from the benefit of their contract, after having obtained a consideration which cannot be returned, for it is impossible to restore the parties to the situation they were in, before the contract was entered into, because the Act has passed and has now become the law of the land. They have a competing line established upon certain considerations specified, and not objectionable, according to my view of the case. There is nothing of illegality or impropriety on the part of either of the Companies, but a consideration is expressed in the contract, of which the North Western Railway Company are attempting to deprive their opponents, with whom they have entered into that contract. Then, if anything

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were wanting to bring the case within the latter part of the third provision of the agreement, that they shall do nothing to the prejudice of the traffic “ which properly belongs ” to the plaintiffs’ railway,—the bill alleges that they have actually so lowered their toll—not for the purpose of benefiting themselves, for if they had not had that competing line those tolls would never have been lowered, but they are lowered to a smaller sum for the longer distance than they charge for the shorter distance. For what purpose is that done? Why, for the purpose of bringing on the defendants’ line passengers who would otherwise travel on the plaintiffs’; and, consequently, they must necessarily interfere, from the lowness of the tolls, with any traffic that might otherwise flow on to the line of the plaintiffs. That shews, therefore, a studious and anxious—certainly, an intentional—injury inflicted on the plaintiffs’ line, in violation of the contract they have entered into, obviously for the purpose of creating an injury to them, and thus destroying this minor Company and increasing their own profits. It falls, therefore, most distinctly within the prohibition of the contract that the parties have entered into, of not doing anything to interfere with the traffic properly belonging to the plaintiffs’ line. Those then are all the objections made. The breach of the contract is perfectly well established: it is quite obvious that the defendants are competing with the plaintiffs as to the traffic to Wolverhampton and to Birmingham; for, although the intended line from Wolverhampton to Birmingham is not yet completed, it is clear that those two towns are on the line projected for the benefit of the plaintiffs. What has been done, therefore, is an act studiously arranged for the purpose of injuring their line, and is in direct violation of the contract which the parties have entered into.

The bill alleges, that the defendants have not kept any accounts, which it was their duty to do, and that they have carried passengers at reduced fares; which shew the

nus with which they have acted. It seems to me,—
 never may become of this case at the hearing, if the
 facts are established which appear upon the face of the
 —that upon the allegations contained in it there is a
 clear case upon which the demurrers must be overruled.

r. *Bethell*, on behalf of the plaintiffs, submitted, that,
 the construction of the agreement was purely a legal
 question, in accordance with the established practice and
 principles of this Court, an opportunity should be granted
 making the opinion of a Court of law upon it.

the LORD-CHANCELLOR was, however, of opinion that he
 did not do that on demurrer: the proper time for giving
 liberty being at the hearing of the cause.

the counsel for the plaintiffs then submitted, that, as
 there was a distinct and separate order made, refusing the
 motion solely on account of the allowance of the de-
 murrers, his Lordship should at once dispose of that order,
 allow them to give notice to hear it upon appeal. His
 Lordship, however, refused to hear a motion on appeal
 which had not been heard in the Court below.

the plaintiffs then applied to the Vice-Chancellor, on
 ground that his judgment on the demurrers had been
 overruled, for an injunction in the terms of the prayer of
 the bill; which the Vice-Chancellor accordingly granted.

the defendants thereupon moved, before the then Lord
 Chancellor (Lord *Truro*) to discharge the order of the Vice-
 Chancellor of *England* granting the injunction.

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with respect to granting the injunction, *Foss v. Harbottle*, *ley v. Alston* (e), *Lord v. The Governor and Copper Miners* (f). And as to the proper timing the injunction, *Waters v. Taylor* (g).

Mr. Willcock appeared for the Shropshire Uways and Canal Company.

Mr. Rolt, Mr. Malins, and Mr. Hardy, in support of the order of the Court below, cited *Edwards v. Junction Railway Company* (h), *Lord Petre v. Counties Railway Company* (i).

In the meantime, before the appeal came on, the defendants put in their answers, by which, among other things, that they believed that the basis of the agreement of the 13th of May, 1843, which the plaintiffs withdrew their opposition in Parliament, were founded distinctly and upon the faith and understanding that there should be no competition between the plaintiffs and the London and Western Railway Company, either alone or in connection with any other railways.

Dec 2nd. The LORD CHANCELLOR (k).—This cause came

Court on a motion to dissolve an injunction granted on affidavit before answer by the late Vice-Chancellor of *England*, by which the defendants were restrained from conveying or carrying any passengers, cattle, goods, luggage, or other matters or things from Stafford and Wellington, or from any point between these places, to any point or place upon the line of the plaintiffs' railway, or the Birmingham, Wolverhampton, and Stour Valley Railway, or using the line of the Shropshire Union Railway Company by Gnosal or Stafford to compete for any traffic which properly belonged to the plaintiffs, until the further order of the Court. It is to be observed, that the word "traffic" is frequently used here as intending to comprise the various things mentioned in detail; it is convenient so to adopt it on the present occasion.

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The question for consideration arises chiefly upon an agreement stated in the pleadings, of which it is the object of this suit to enforce specific performance, and upon the construction of the Act of Parliament referred to in that agreement. These questions are many of them purely legal questions; and the equity, which must be established by the plaintiffs to sustain the agreement, mainly depends upon those legal questions. It is not necessary that I should enter into a detail of the whole of them. Among others I may notice the questions:—1. Whether the agreement itself is a valid agreement in point of law; and, if so, 2. Whether the events which were to come into operation between the parties have taken place; and whether the acts which the plaintiffs impute to the defendants, or any of them, amount to breaches of the agreement on the part of the defendants.

Among many other things it is contended, that the agreement is entirely void at law, as being contrary to public policy, or as "inconsistent" with the duties and obligations imposed by the statute, under which the re-

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Mr. *Bethell* and Mr. *Follett*, in support of the appeal as to the illegality of the agreement, *The Earl of Hobart* (a). As to the balance of convenience and convenience, *Harnett v. Yielding* (b), *Spottiswoode v. Cl*. And as to the agreement to submit matters to arbitration which they contended had the effect of restraining exercise of the ordinary jurisdiction of the Court as to granting the injunction, *Foss v. Harbottle* (c), *ley v. Alston* (e), *Lord v. The Governor and Company of Copper Miners* (f). And as to the proper time of granting the injunction, *Waters v. Taylor* (g).

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In the meantime, before the appeal came on to be argued, the defendants put in their answers, by which they stated, among other things, that they believed that the terms of the agreement of the 13th of May, 1841, on which the plaintiffs withdrew their opposition to the Bill in Parliament, were founded distinctly and positively on the faith and understanding that there should be no competition between the plaintiffs and the London and North Western Railway Company, either alone or in connection with any other railways.

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The LORD CHANCELLOR (k).—This cause came before

(a) 3 My. & K. 169.

(b) 2 Sch. & Lef. 549.

(c) 2 Ph. 154.

(d) 2 Hare, 461.

(e) Ante, Vol. 4, p. 636.

(f) 2 Ph. 740.

(g) 15 Ves. 10.

(h) Ante, Vol. 1, p. 11.

(i) Id. 462.

(k) Lord *Truro*.

Court on a motion to dissolve an injunction granted on affidavit before answer by the late Vice-Chancellor of *England*, by which the defendants were restrained from conveying or carrying any passengers, cattle, goods, luggage, or other matters or things from Stafford and Wellington, or from any point between these places, to any point or place upon the line of the plaintiffs' railway, or the Birmingham, Wolverhampton, and Stour Valley Railway, or using the line of the Shropshire Union Railway Company by Gnosal or Stafford to compete for any traffic which properly belonged to the plaintiffs, until the further order of the Court. It is to be observed, that the word "traffic" is frequently used here as intending to comprise the various things mentioned in detail; it is convenient so to adopt it on the present occasion.

The question for consideration arises chiefly upon an agreement stated in the pleadings, of which it is the object of this suit to enforce specific performance, and upon the construction of the Act of Parliament referred to in that agreement. These questions are many of them purely legal questions; and the equity, which must be established by the plaintiffs to sustain the agreement, mainly depends upon those legal questions. It is not necessary that I should enter into a detail of the whole of them. Among others I may notice the questions:—1. Whether the agreement itself is a valid agreement in point of law; and, if so, 2. Whether the events which were to come into operation between the parties have taken place; and whether the acts which the plaintiffs impute to the defendants, or any of them, amount to breaches of the agreement on the part of the defendants.

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spective Companies, the plaintiffs and defendants, are incorporated, and under which they derive their power. The defendants also contend, that the agreement is void for uncertainty; and, further, that the agreement, if valid, has not come into operation, and cannot do so, until an actual lease shall be granted of all the lines of railway mentioned in the Act referred to in the agreement, pursuant to and in conformity with the provisions of that statute; and that such lease has not yet been granted, and cannot be. On the other hand, the plaintiffs insist upon the legality and validity of that agreement, and contend, that, as one of the lines of railway from Wellington and Gnosal to Stafford has been completed, and is used by the London and North Western Railway, the agreement has come into operation, although no lease has been formally or actually granted, pursuant to the Act; and that they, the plaintiffs, are now, consequently, entitled to the benefit of the agreement.

As it is my intention to give the plaintiffs the opportunity of bringing an action at law, it will be premature in me to express an opinion upon these points. It is enough for me now to say, that I consider that some of them may be open to considerable doubt, and that they must be decided before the equities involved in this case can be properly administered; and it is convenient and desirable that the parties should have the opportunity of procuring such legal decision in this stage of the cause, rather than postponing it till the hearing. It appears, indeed, that, upon the occasion of the demurrers to the bill being argued before Lord *Cottenham*, the defendants asked to have the decision of the Court of law upon the legal point in dispute; but his Lordship thought their application could not then be granted, although it might be properly granted at the hearing. Since that time the answer has been put in; and it seems to me, upon some of the matters stated in the answer, that the time has now arrived at

which it is proper that the opinion of a Court of law should be taken. With respect to the best form of proceeding for obtaining a satisfactory legal decision, I think it will be, by an action to be brought by the plaintiffs upon the agreement, in which they may allege as many breaches as they may be advised; and the defendants would then be able to contend against the legal validity of the agreement altogether, or may also controvert as many of the breaches assigned on the part of the plaintiffs as they shall deem expedient.

I have read through the affidavits and the answer, with a view to ascertain if the case could be properly disposed of at the hearing, on equitable grounds merely; but I think it cannot be, and that a legal inquiry must, at all events, be had: it also appears to me that there is no sufficient reason for continuing the injunction; and I do not think that the injunction can be maintained consistently with the rules by which this Court is regulated in granting injunctions. The injunction is granted in aid of an alleged legal right—that right has not been established at law, and is denied by the defendants: it is unquestionably open to doubt. The injunction will interfere with the exercise of *prima facie* legal right in the defendants. It is not required, as it appears to me, for the protection of the plaintiffs against irremediable mischief, until the hearing. The plaintiffs' interests and rights may be protected by an account kept by the defendants, such as I purpose to require; indeed I think the plaintiffs may gain by the injunction being dissolved, but can scarcely be damnified; because, if the defendants be restrained in the terms of the injunction, passengers and traffic may be prevented from being conveyed by the defendants' railway, who never would have been by the plaintiffs, in any event, and which would, therefore, be a loss to both plaintiffs and defendants; and the plaintiffs should fail in establishing their equity, there is no mode by which the defendants could be in-

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demnified against such a loss; whereas, if the defendants are not restrained, and keep an account of all passengers and traffic which, it is supposed, may interfere with the plaintiffs' equity, the plaintiffs, on the establishment of their equity, may be benefited by the result of such an account, although such persons might never have gone by the plaintiffs' railway.

The statement made on the part of the plaintiffs of the possible injury to them by reason of their own narrow circumstances, by being deprived of the receipt of fares in the interval between the present time and the hearing, has not escaped my recollection; but I do not think that the rights of the defendants can be varied by reason of the plaintiffs' peculiar state of circumstances. There is also a vagueness in the terms of the injunction, which renders it very undesirable that it should be continued. Whether it is open to the objection of uncertainty, such as occurred in the case of *Lord Ripon v. Hobart* (a), it is unnecessary now to inquire with reference to the view which I take of the whole case. Upon the whole, therefore, the order, which I think ought to be pronounced, is, that the injunction be dissolved, and the order which directed it to issue be discharged, with liberty to the plaintiffs to bring such action as they may be advised, with the usual directions and liberty to apply; the plaintiffs and the defendants mutually undertaking to keep the separate accounts specified in the agreement, and the defendants keeping an account of all passenger and other traffic conveyed from Stafford or Wellington, or any point between those places, to Wolverhampton, and to Birmingham and Portobello, respectively, on any part of the plaintiffs' line, viâ Stafford. Such is the substance of the order, which the parties and the Registrar will arrange.

With respect to the costs of the present motion, I do not think it necessary to make any order whatever, as I

(a) 3 My. & K. 174.

have some doubt whether it came regularly before me. The defendants have moved to dissolve the injunction on the answer coming in; and as the answer was not before the Vice-Chancellor, this motion appears to me to have very much the character of an original motion, which ought not regularly to have come before me. But, having heard the case fully argued, I think it right to decide generally on the question; and as it has partaken so much of the nature of an appeal, I think I ought not to give the costs.

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In pursuance of the leave given by the judgment of the Lord Chancellor (Lord *Truro*), the plaintiffs brought their action in the Court of Queen's Bench against the defendants. The breaches assigned by the declaration were—

First. That the London and North Western Company had conveyed passengers, contrary to the third clause of the agreement.

Second. That the London and North Western Company had used the line viâ Gnosal and Stafford to compete, contrary to the third clause.

Third. That the Shropshire Union Company had carried as in first breach.

Fourth. That the Shropshire Union Company had used the line viâ Gnosal and Stafford as in second breach.

Fifth. That both Companies had evaded the agreement, contrary to the fourth clause.

The demurrer to the first count in the declaration came to be heard in the Queen's Bench (a). And, on that occasion, the Court held the declaration to be bad; and gave judgment for the defendants on the ground that there was no averment of a lease being granted in conformity with

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(a) Before Lord *Campbell*, C.J., and *Patteson*, J.

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the stipulation of the agreement on which the action was brought, and that the plaintiffs could not maintain the action on the four first breaches until that lease had been granted.

The second general demurrer came on to be argued in the Queen's Bench (a), which was in fact narrowed to the fifth assigned breach.

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Lord CAMPBELL, C. J., delivered the following judgment.—This was a general demurrer to the fifth breach assigned by the declaration in an action on a breach of covenant contained in certain articles of agreement made between the plaintiffs and defendants.

The articles themselves are set out in extenso by the defendants on oyer. By the fourth article it is provided, that the agreement thereby come to shall not in any manner be evaded or eluded by either of the contracting parties, nor shall any arrangement, scheme, device, or contrivance be resorted to or attempted for that purpose.

The fifth breach is assigned on that article, in terms alleging that the defendants did evade and elude the agreement, and resorted to and attempted divers arrangements, schemes, devices, and contrivances for the purpose of avoiding and eluding the agreement. To this breach the defendants demurred generally, on the grounds as stated in the argument:—First, that the declaration was defective in not containing an averment that the lease had been made as mentioned in the agreement; the defendants contending that the different articles in the agreement were only binding during the existence of such lease: and second, that the agreement itself was wholly void, as a fraud upon the legislature, the public, and the shareholders of the

(a) Before Lord Campbell, C. J., Patteson, J., Coleridge, J., and Wightman, J.

spective Companies. With respect to the first of these objections, that there is no averment of the existence of the lease, it is sufficient to observe, that the article on which the breach is assigned is wholly independent of and unconnected with it. We are therefore clearly of opinion that that objection cannot be sustained.

The question then is, whether the agreement is void at law. As it has been clearly settled, that an agreement to withdraw opposition to the bill of a railway Company for pecuniary or other considerations not in the bill, is not legal, the agreement in question would not be void, unless it was illegal upon other grounds, such as those suggested on the part of the defendants. But it is said, that it was injurious to, and therefore in a legal sense a fraud upon, the public or the shareholders; the defendants' counsel contending, that it is injurious to the public, by giving in effect a monopoly to the plaintiffs, and thereby depriving the public of the benefit that would be derived from competition.

If this were so, and the parties proposed by their agreement to endeavour to prevent competition generally, there might be weight in the objection; but the effect of the agreement is only, that the one Company shall not compete or interfere with the other upon the particular line mentioned in the agreement. This is no more illegal than it would be for two persons engaged in trade to agree that one should not exercise his trade, nor compete with the other, within a particular district.

It was also objected, that it was void, as injurious to the shareholders of the Company, and a fraud upon them, by the stipulation to divide the profits. If such a stipulation were necessarily injurious to the shareholders, the objection might be valid; but this stipulation may be entirely for the benefit of the shareholders, as without the co-operation of the two Companies perhaps no profit could be made. The same objection to the validity of the agreement was urged in a case in Chancery between

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the same parties, before the late Lord *Cottenham*. The case was fully argued; and in a very elaborate judgment delivered by Lord *Cottenham* (a), he held that there was nothing in this agreement contrary to the duty which the parties respectively owed to Parliament, or to the public, or to their own subscribers. But before stating our entire concurrence with what is said by the Lord Chancellor in his judgment, it is necessary to advert to an objection as to the illegality of the agreement, which was not taken when the case was before him, or at least is not adverted to by him. This objection was founded on the third article of the agreement, by which it is provided: "That the Shropshire Union Railways and Canal Company, and the London and North Western Railway Company, or either of them, shall not nor will convey or carry any passengers, cattle, luggage, goods, or other matters or things from Shrewsbury or from Wellington, or from any point between those two places, to any point or place on the line of the Shrewsbury and Birmingham Railway, or the Birmingham, Wolverhampton and Stour Valley Railway, nor use the line of the Shropshire Union Railway by Gnosal or Stafford to compete for any traffic which properly belongs to the Shrewsbury and Birmingham Railway." This clause in the agreement is said to be contrary to the Act of Parliament which contains provisions for the conveyance of her Majesty's troops and the mails by railway, and which was obligatory on the railway Company.

It may well be doubted whether the conveyance of her Majesty's troops or mails, under the compulsory clauses in the statute referred to, would come within the intention and meaning of this third clause, by the terms "passengers, cattle, goods, or other matters or things," the parties only intending to include whatever might come within the ordinary interpretation of those terms;

(a) Ante, p. 548.

that we are of opinion there is nothing in this clause in derogation of the right of the Crown to send soldiers or mails by railway to any place within the prescribed limits, they may go by the Shrewsbury and Birmingham, or by Birmingham, Wolverhampton, and Stour Valley line to any places within the specified limits. There is nothing in the clause of the statute relating to troops or mails which would oblige the defendants to become carriers upon particular parts of a line, upon which they have agreed with another Company that they will not compete with them as carriers.

Upon the whole case we are of opinion that the objections taken by the defendants cannot be supported; and that the plaintiffs are entitled to our judgment.

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The second count of the declaration was founded on the recement of the 12th October, 1847, and averred in the introduction, that the Shrewsbury and Stafford Railway was complete; that a lease had been granted; that possession had been taken, and the line worked by the London and North Western Railway Company, *under and by virtue of the lease (a)*.

The demurrers having been overruled, the defendants added to the declaration.

The issues as to the London and North Western Railway Company, which remained to be decided, were—

First. Whether the Shrewsbury and Stafford Railway was complete.

Second. Whether the lease was granted.

Third. Whether the London and North Western Company had possession under the lease.

2) The words in italic were introduced with the consent of the Court, at the suggestion of counsel for the Defendants (Sir F. Kelly) when the plea of “no certificate of the Railway Commissioners” was withdrawn.

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The issues as to the Shropshire Union Railways and Canal Company were—

First. Whether the Shropshire Union Railways and Canal Company had evaded.

Second. Whether any lease had been granted.

Third. Whether the lease granted was required by the leasing Act.

These issues had not been decided when the defendants to the original bill filed a cross bill, and subsequently a supplemental cross bill, the former stating, among other things, that the majority of the shareholders of the Shrewsbury and Birmingham Railway Company had become dissatisfied with the course pursued by their directors, and that it was their interest to work their line in connection, and not in competition, with the London and North Western Railway; and a committee of inquiry had been appointed, with power to re-open negotiations with the last-mentioned Company, which resulted in a provisional agreement between the two Companies, which was duly confirmed at an extraordinary general meeting of the Company on the 4th of April, 1851; and the cross bill prayed that that agreement might be performed, and that an injunction might issue to restrain the Shrewsbury and Birmingham Railway Company from excluding the London and North Western Railway Company from the use of, and from preventing them from using, the railway stations, watering-places, &c., of the Shrewsbury and Birmingham Railway, according to the provisions of the agreement; and from preventing the London and North Western Railway Company from taking possession of the engines, &c., and from carrying any traffic otherwise than according to the provisions of the agreement, and from otherwise contravening or acting contrary to the provisions and stipulations of the last-mentioned agreement.

A further motion was then made, for an injunction, be-

re the Master of the Rolls, to whom the cause was transferred; but that motion was ordered to stand over until the hearing of the cause.

The original bill, and the cross bill and motion, came on for hearing before the Master of the Rolls.

Mr. *Rolt*, Mr. *Hardy*, and Mr. *Giffard* appeared for the plaintiffs, the Shrewsbury and Birmingham Railway Company.

Mr. *Willcock* and Mr. *Chapman* for the Shropshire Union Railways and Canal Company.

The *Solicitor-General*, Mr. *Follett*, and Mr. *G. V. Prior* for the defendants, the London and North Western Railway Company, and in support of the cross bills.

Mr. *Roundell Palmer* and Mr. *W. M. James* for the defendants, Glyn and Cowan.

The MASTER OF THE ROLLS, after stating the facts and proceedings in the suit, continued as follows:—

The case of the plaintiffs is, that the defendants have entered into an agreement which they have violated, and that they ought to be restrained from so doing. The defendants, on the other hand, contend that the agreement is void at law, both as being contrary to public policy, and so as being beyond the powers that the Companies possess under their Acts of incorporation; and if they fail in this, then they contend that the period when the agreement is to come into operation has not yet arrived, and that it cannot do so until an actual lease shall have been granted of all the lines of railway mentioned in the Act and which are referred to in the agreement. And, lastly, they contend that the acts complained of by the plaintiffs are not any violation of the contract entered into. The plaintiffs contend that all these questions have been determined, in truth, in their favour in this case, by Lord *Cottenham*; and that, so far as the Court of law has come to any

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so determined, by reason of the form adopted course pursued at law; and that, consequently ought to direct the plaintiffs to complete their at law, in order that the questions, still remain the plaintiffs and the defendants, may be subject to the decision of a Court of common law in the regular and that, in the meantime, the cause ought to stand over.

I am not, however, disposed to adopt the course urged upon me. Upon a full consideration of the matter I have thought it better for the parties than more consistent with the duties imposed upon me especially since the late statute, to endeavour to come to the best conclusion I can upon the matter at issue; and by this means the questions presented at an earlier period, come to be decided by this tribunal, with such assistance as they may require, than if I sent the questions to be tried on the remaining issues, not disposed of by the judgment demurring at law.

In determining, therefore, the points before me in the course of so doing, to examine how far I ought to consider myself bound by what has been decided respecting them: and whether that is

the bill solicited by the defendants in Parliament is also admitted. There was, therefore, a sufficient consideration to support it; and unless there be some valid objection to the agreement itself, or unless the time for its coming into operation has not arrived, that agreement must be enforced, and the defendants restrained from doing any acts in violation of it; and, in the determination of that last question, the Court will look at the substance and not at the form, for the purpose of ascertaining whether the acts done, though not in terms, are in substance a violation of the agreement.

The first question, therefore, is, whether the agreement is a valid or an invalid agreement. The two grounds upon which the defendants urge that the agreement was invalid were, first, that it was injurious to, and therefore a fraud upon, the public, by creating a monopoly. Secondly, that it was not within the scope of the Acts of Parliament incorporating these railways, that one of them should enter into a partnership, as it were, with another railway Company for the purpose of dividing the profits earned by them in any undertaking.

The first ground of invalidity has been overruled by Lord *Cottenham*, and also by the decision of the Court of Queen's Bench. The second ground of invalidity was not entered into very fully by Lord *Cottenham* in his reported judgment, and does not appear to have been mentioned in the judgment delivered at law. It must, however, be considered to have been decided inferentially by both those tribunals, in deciding that the agreement was valid and legal; and assuming that this species of partnership was not within the scope of the earlier Acts, yet if it be expressly authorised by the later Act, it might be difficult to contend successfully,—to employ the expression used by Lord *Cottenham*,—that the later Act was a breach of the contract entered into with that Parliament which affirmed the earlier Acts.

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validity, because it was directly inconsistent powers and duties conferred on the Company by of incorporation.

Finding, therefore, that this question of the agreement has, in truth, been decided in the plaintiffs, both at law and in equity; and that in the course of these proceedings has expressed upon this point, it would be impossible for me entertained graver doubts upon the subject than posed to do, to act in defiance of these opinions Lord Chancellor and of the Court of Queen's to refuse the plaintiffs relief on any ground concerning the invalidity or illegality of the agreement. I to which I fully concur in the sentiment stated to have been expressed by Lord St. Leonard's in of *Hawkes v. The Eastern Counties Railway Co* to the effect that the Court looks with great disapprobation at an objection of illegality of a contract, urged to that contract, in order to avoid the performance of acts which he has stipulated to do, and for which he has received the consideration for which he has contracted.

The next question, however, stands on a very different ground. It is this, whether the agreement is to have effect before a lease is granted. in accordance

nion, I think it material to refer once more to the history of the proceedings. The Vice-Chancellor of England was of opinion that the time for granting the lease had not yet arrived; and that, accordingly, the time for the agreement to come into operation had not yet arrived; and on that ground he allowed the demurrers of the defendants. Lord *Cottenham*, on appeal, in over-ruling the demurrers, dissented from that view of the case, and was of opinion that the lease, or the relation of landlord and tenant, had come into operation on each railway as it was completed; and, on being asked to grant a case for the opinion of a Court of law generally upon the construction of the agreement, stated, that the time for doing so would be at the hearing of the cause.

On the motion to dissolve the injunction, after the answer was filed, Lord *Truro* sent the whole question of construction of the contract and statute to the consideration of a Court of law, by directing the plaintiffs to bring an action. It is clear, therefore, that Lord *Truro* considered that Lord *Cottenham's* judgment was not conclusive upon this subject, and that it ought to undergo further consideration, before the Court of Chancery could properly decide it. And this was not contrary to Lord *Cottenham's* view, who could not, with propriety, on demurrer, have adopted the course taken by Lord *Truro*, unless indeed by consent. I consider, therefore, that the decisions of the Lord Chancellors leave this question to be decided subsequently by the Court before whom it might properly come.

How far this question has been determined at law is a matter of contest, and does not appear to me to be very plain. It has been decided undoubtedly, that, in the absence of a lease, the agreement has not come into operation; but whether, if a lease were now granted of that part of the line from Shrewsbury to Stafford, it would be a lease in pursuance of the authority contained in the Act, I do not find to be decided; and as I cannot, after Lord

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there are certain equitable considerations which in connection with it, that would not be disposed of by the decision of a Court of law. I have, therefore, for various reasons, and those which I have already stated, it is incumbent upon me to decide this question myself.

Before considering the question in detail, I think it will be better to distinguish between what may be treated as a legal question and what as the equitable view of this question.

It is admitted that, if a lease having been granted, is admitted to be valid in a Court of common law against the plaintiff, it is contended, that, in equity, the mere circumstance that an indenture of demise has been or has not been executed is immaterial; that equity regards that as done which ought to be done, and regulates the rights and liabilities of the parties exactly in the same manner as if the thing had been given what is technically called the legal effect. This principle is not in dispute on the other side, but it is contended that it is inapplicable to the present case; for that, according to the construction of the agreement, that instrument was not expressed nor intended to be operative until the lease was granted in accordance with the statute; and the provisions of that statute, not only no lease could be granted, but no lease could be granted: and the

provisions of the statute, a lease might be granted of that portion of the undertaking which is now actually completed and open for traffic; or if, according to the provisions of that Act, the London and North Western Railway Company are to be treated as the actual lessees of that portion of the undertaking, though no such lease has been granted.—Whether the time for the agreement coming into operation has actually arrived depends, therefore, partly on the contract and partly on the effect to be given to the provisions of the Act of Parliament, the construction of each of which must be the same both at law and in equity.

The first question is, the effect of the agreement of the 12th of October. It is made between the plaintiffs of the one part, and the defendant railway Companies of the other part. It recites, that the railway between Shrewsbury and Wellington is common to the plaintiffs and the Shropshire Union Railways and Canal Company. Then it recites, that a bill was introduced to authorise a lease of the Shropshire Union Railways and Canal Company to the London and North Western Railway Company, and that it was opposed by the plaintiffs. And the third recital is in these words:—"Whereas the Shrewsbury and Birmingham Railway Company agreed to withdraw their opposition to the bill, on its being mutually arranged and agreed between the said Companies, that the covenants and agreements hereinafter contained should be mutually entered into by them upon an Act of Parliament being obtained for authorising such lease as aforesaid," that is, a lease in perpetuity of the undertaking of the Shropshire Union Railways and Canal Company to the London and North Western Railway Company, "or a lease between the same parties of any part of the said undertaking between Shrewsbury and Stafford." "And whereas such Act was obtained during the last session of Parliament." Then comes the first clause of the agreement, which is to take

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effect from time to time and at all times hereafter during the continuance of any such lease authorised to be granted by such Act:—that is, during the continuance of any lease, either of the whole undertaking, or of any part of the undertaking between Shrewsbury and Stafford; provided only, that it be a lease which is authorised to be granted by such Act. The third clause is, that, during the continuance of any such lease as aforesaid, the defendant will not carry passengers or goods within the prohibited parts or compete for traffic belonging to the plaintiffs. It is therefore in my opinion plain, that, according to the articles of agreement, it is to have effect during the continuance of any lease authorised to be granted by the Act whether the lease so authorised be of the whole or only of such part as before mentioned. To determine this, I turn to the Act. There is no question, but that the Act authorises a lease of the whole undertaking. The question is whether, in the events which have occurred, and in the present state and circumstances of the railways and of the parties, as these matters appear in evidence before me, the Act authorises a lease of a part of the undertaking, viz. of that part which constitutes the line from Shrewsbury to Stafford.

After carefully considering the provisions of the statute with a view to this subject, and weighing the arguments of counsel, and the judgment of Lord Cotton *him*. I have come to the conclusion, that a lease of that part of the undertaking between Shrewsbury and Stafford which is completed, is not authorised by any of the provisions of the leasing Act. In the first place, there is only one clause which authorises any lease to be granted that clause is the first. It recites the various works which constitute the undertaking of the Shropshire Union Railways and Canal Company, and it then empowers and requires the Shropshire Union Railways and Canal Company to grant, and it empowers and requires the London and North Western Railway Company to accept, a lease in per-

petuity of that undertaking. Not a word is said here of any authority or power to grant a lease of any portion of that undertaking. If it stood on this clause alone, no doubt or question could, in my opinion, be raised upon it; there are no words from whence it could be argued successfully, that the Shropshire Union Railways and Canal Company had a power of leasing a part only of the undertaking. On looking through the rest of the Act, I can find no clause which, in express terms, authorises the granting of a lease of a part only of the undertaking. If, therefore, such a power is to be found in the Act, it must be by implication or necessary inference, to be drawn from the provisions contained in the other clauses, and from the general scope and purport of the Act. The next nine sections do not appear to me to have any bearing upon this point. The first section relied upon for this purpose is the 11th. [His Honour then read the 11th section (a)]. This, therefore, enacts, that when a portion of the undertaking is completed, the London and North Western Railway Company are to be put into complete possession of that portion, for the purpose of working it. [His Honour then read the 19th section (a)].

The construction of this section appears to me to be plain, that, when the whole undertaking is completed, a lease of the whole shall be granted to the London and North Western Railway Company, at a rent which shall be equal to a dividend upon the capital raised and expended in the formation of the undertaking of half the amount of rate per cent. of the dividend paid on the London and North Western Railway Company's shares; and that, as each portion of the undertaking is completed, the London and North Western Railway Company shall be put in possession of such portion, and shall pay a proportional rent for such portion according to the rate above stipulated.

(a) Ante, p. 535.

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This certainly does not amount to or constitute a lease, or any authority to grant a lease, either at law or in equity; and it is always to be borne in mind in considering this question, that no power of granting or accepting a lease is to be found in the original Acts incorporating these Railway Companies; and that, therefore, no valid lease could be granted or accepted by the Company, except such as was authorised by the statute. I have read through the rest of this statute in order to see whether, from any of the other clauses, any such authority could be inferred; but I have not been able to find any. The 12th section has no bearing upon the question. The 13th section directs the London and North Western Railway Company to keep separate accounts of the undertaking thereby authorised to be leased, or so much thereof as shall, from time to time, be under the power of the London and North Western Railway Company, by virtue of that Act; thereby drawing a clear distinction between the lease that was to comprise the whole and the possession of the London and North Western Railway Company, which might comprise only a part. The 14th section has no bearing upon the point. It speaks of the railways thereby authorised to be leased; but it contains nothing from which a separate lease is to be inferred. The 15th draws the same distinction as the 13th. The 16th speaks of the undertaking authorised to be leased as if it were one thing. The 17th and 18th have no bearing upon the question; and the 20th, 21st, 22nd, and 23rd are also silent upon this point. The 24th speaks of the lease of the railway thereby authorised as if only one lease was to exist. The 25th speaks of the lease thereby authorised to be made, and, notwithstanding such lease, as being clearly a lease of the whole undertaking. The 26th is different. This section distinctly speaks of the leases in the plural, it is as follows: "That, from and after the completion of the said railways, the London and North Western Railway Company shall

defray all necessary charges of the Shropshire Union Railways and Canal Company, for the transaction of their current business and the execution of the powers which may remain vested in them in relation to their several concerns, in addition to the rent payable on the said leases." I am unable to explain why the word "leases" is here in the plural, being in the singular in the rest of the statute; but I find no passage in the statute which authorises more than one lease, and no other passage which speaks of more than one lease, either directly or inferentially.

It would therefore, in my opinion, be too violent a construction to infer, from the word being used in the plural, that a lease was to be granted of each railway as each was completed. The 27th, 28th, 29th, and 30th clauses have no bearing on the question either way. The 31st clause is important, and is in my opinion decisive against the construction which the plaintiffs seek to place on this Act. [His Honour then read the 31st section (a)].

This section positively prohibits the Shropshire Union Company from granting, and the London and North Western Railway Company from accepting, a lease of the undertaking, unless it shall have been proved that one half of the whole amount of the capital for the whole undertaking has been not merely paid, but actually expended for the purpose of the undertaking. Courts of justice have, in the construction which they have put on Acts of Parliament, taken great liberties with expressions contained in them, and virtually in some cases have by decrees overruled what probably was the intention of the legislature; but such violence in interpreting an Act of Parliament I never met with in any case, as to say that when Parliament authorises a lease to be granted, which could not be granted without that authority, and imposes as a condition, that, before the lease is granted, a particular sum of money

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shall be subscribed and spent in a particular manner, that that is a condition which may be totally disregarded, and that not only a lease may be made without that being done, but further, that a lease may be made of a portion, on a proportional part of that sum being subscribed and expended. The remaining clauses of the Act, from the 32nd to the 39th, both inclusive, do not affect the question under consideration.

Now, what I have to consider is, whether, in this state of things, and under the provisions of the Act which I have referred to in detail, a lease might be granted of a portion of the undertaking which is completed, or, what is the same thing, whether the Shropshire Union Company could compel the London and North Western Railway Company to accept such a lease, or whether the London and North Western Railway Company could compel the Shropshire Union Company to grant such a lease; and I am of opinion that neither Company, however desirous to do so, could enforce in such a case a lease being either accepted or granted. It was urged by counsel, that the Act authorised a lease of the railway from Shrewsbury to Stafford, and that this was sufficient; and that it was not material that it also authorised two other leases. This argument, if adopted, would, in my opinion, simply overrule the Act of Parliament, which authorises one lease and one lease only; and although on the completion of each line it authorises the London and North Western Railway Company to take possession of that line, it nowhere authorises a lease of that portion, but, on the contrary, prohibits any lease until a condition is performed which still remains incomplete. I am therefore of opinion, that such a lease as is authorised by the Act has not been made, and cannot, as yet, be made.

It is however argued, that, even if this be the correct construction, the plaintiffs are entitled to relief on this ground, that the Court is first to consider what the thing

is which was referred to in the agreement as the subject of the lease; and, secondly, to consider whether the defendants have not that which in equity is equivalent to demise of the very thing which was referred to in the agreement as the subject of the demise: that the thing referred to as the subject of the lease was these various railways and the canal; and that the defendants have, under the Act of Parliament, got possession of the one railway completed, as fully and completely as if they had a lease of that portion of it; and that, in equity, they must be treated as if they were lessees in possession. The answer to this appears to me to be clear and decisive. The question is not what the powers of the defendants over the railways may be, but what is the construction of the contract which they have entered into. They have agreed to do, and to abstain from doing, certain acts during the continuance of a lease authorised by the Act of Parliament. The agreement is clear and precise, that it is to be operative during the lease authorised to be made by the Act of Parliament; I am of opinion that a lease authorised to be made by the Act of Parliament is not now in existence, and cannot be granted at present. If I were to decide that the defendants have something which is as good as a lease, and that therefore this agreement takes effect, I should be introducing a new term into the agreement, and should, in truth, be substituting a fresh agreement for that which the parties have entered into. Nothing would have been more simple and easy than to have expressed the intention of the parties, if that intention existed, that the agreement should take effect pro tanto as to each portion of the undertaking when completed, as soon as the defendants the London and North Western Railway Company were put into possession of that portion of the undertaking; but this is, in truth, omitted altogether from the agreement, and it is upon this principle alone that I am able to explain the decision of the Court of Queen's

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Bench, that the agreement has not come into effect, because the lease has not been made. The agreement, as I have already stated, must bear the same construction at law as in equity; and if the true construction of the agreement be, that the acts contracted to be done by the London and North Western Railway Company are to be done not only when a lease is granted, but also before a lease can be granted,—as soon as the London and North Western Railway Company have possession of any portion of the line,—I am unable to understand why the non-execution of a lease could be fatal to the claim of the plaintiffs even at law.

The result, therefore, in my opinion is, that the time when the agreement is to come into operation has not yet arrived; and I am also of opinion, as I before stated, that, notwithstanding Lord *Cottenham* seems to have come to an opposite conclusion upon the facts as they appeared before him on demurrer, I am bound at the hearing to decide this case upon the materials before me, according to the best of my judgment, giving the fullest weight to the opinion of that eminent Judge.

Having arrived at this conclusion, it becomes unnecessary for me to consider whether the acts done by the plaintiffs are or are not in violation of the agreement which is not yet in operation.

I am of opinion, therefore, that the case of the plaintiffs fails, and that the bill must be dismissed; it is not however a case for costs. I make no order upon the motion, and the costs will be costs in the cause.

From this judgment the plaintiffs appealed, and the appeal came on to be heard before the Lords Justices.

The counsel who argued the case on behalf of the several parties were the same as before the Master of the Rolls.

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KNIGHT BRUCE, L. J.—In these appeals, I think it con-

venient, first, to disembarass the case of the petition of the cross appellants, that namely of the London and North Western Railway Company, who are defendants in one and plaintiffs in the other two of the three bills before the Court. The two last bills were cross bills; and I agree with the leading counsel of the cross appellants in thinking them a defence—(effectual or ineffectual, necessary or unnecessary, I will not determine)—but still a defence merely against the first bill. If any notion of the possibility of obtaining any relief under both or either of the cross bills, beyond the dismissal of the original bill of the plaintiffs, has at any time existed, it was, as I conceive, utterly unreasonable.

Now, there is but one order under appeal; it is intitled in the three suits, and is that which dismisses all the bills, and refuses to make an order on a motion which came before the Court simultaneously with the hearing of the causes. The earlier petition of appeal, that of the original plaintiffs, is properly intitled in each of the three; the other petition is intitled only in one, and that the second cause, and it appears to complain merely of the dismissal of the earlier cross bill. The order under appeal notices, of course, the pleadings in all the causes, the proofs taken in the causes, and, I believe, all the affidavits and exhibits. The cross bill having been merely in effect what I have stated, the whole of the bills having been dismissed without costs, the cross petition of appeal not complaining that the original plaintiffs' bill was not dismissed with costs, and all the materials in the three causes being materials which would have been open to the full use of the cross appellants as respondents to the original appeal if the cross appeal had not been brought, I can see neither apology nor excuse for it. I think, consequently, that the appeal of the cross appellants should be dismissed with costs.

This leaves of course untouched the question of the

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propriety or impropriety, the merits or demerits of the original plaintiffs' petition of appeal, to which I proceed to address myself; and the observations that I shall make are to be understood as confined to that petition.

Among the various points, some, if not all of them, difficult—some, if not all of them, important, which were raised and dismissed during the argument, there are several, in respect of which, as I consider it unnecessary, I do not mean to express any opinion. One of these is the question of the true interpretation of the Act of 1847, intituled “An Act to authorise a lease of the undertaking of the Shropshire Union Railways and Canal Company to the London and North Western Railway Company;” the other, the question of the correct construction of the contract of October, 1847.

I assume for every purpose of the present litigation, though, I repeat, without intimating whether it is in fact my opinion, that both instruments, the Act of Parliament and the contract, ought to be read and construed as the original plaintiffs insist that they ought to be read and construed. In the same way, I assume, in the original plaintiffs' favour, the question of the validity of the instrument of October, 1847, at law—its validity, I mean in a sense strictly and merely legal, is at present immaterial—that is to say, that it may, without damaging or prejudicing the Shrewsbury and Birmingham Railway Company in this litigation, be viewed as one on which an action is maintainable or is not maintainable. The question is still open to controversy, whether the contracts of October, 1847, are, or either of them is, such as a Court of equity ought to enforce against the London and North Western Railway Company at the instance of the original plaintiffs, either wholly or in part; and no injustice will, I think, be done to either side by considering the whole dispute here as reduced substantially to that point.

Now, the contract of October, 1847, is under the seal of

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the London and North Western Railway Company, and must be regarded everywhere as the deed of that corporation. But not every deed executed by a corporation is enforceable against it in equity, or even at law. The deed of a corporation may be ultra vires, and so ineffectual, though not in any other sense illegal; and in a Court of equity, at least, the manner of entering into the agreement intended to be carried into execution by the deed, the character and position of the persons by whom the agreement was made, its circumstances, and the authority and direction under which the common seal was affixed, may all be material to the question whether effect shall be given to the deed.

The deed in dispute here had the common seal of the London and North Western Railway Company affixed to it by the order and authority of its directors, that is, by the delegated managers of its affairs, who caused this to be done for the purpose of carrying into effect an agreement which they had taken on themselves to make as on behalf of the Company. But the directors of a Company, such as the London and North Western Railway Company, are, in a sense,—no unimportant sense,—trustees of their functions and powers for the shareholders, and perhaps also for society at large,—certainly, however, for the shareholders; and if directors thus circumstanced enter into a contract amounting to a breach of trust, as between themselves and those for whom they are trustees, it would be contrary to the principles and practice of this jurisdiction to be active in enforcing it in a manner possibly prejudicial to the interests, or not agreeable to the views, of all or some of the cestuis que trust, at the instance of persons cognizant, throughout and from the beginning, of the true nature, character, and circumstances of the agreement.

The original plaintiffs must, I think, for every purpose now material, be taken to have been throughout, and

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I may add a word as to the authorities. If it were necessary for me to mention any, I should specify *Mortlock v. Buller* (a), *Turner v. Harvey* (b), *Bridger v. Rice* (c), *The Charitable Corporation v. Sutton* (d), *Natusch v. Irving* (e), *The Attorney-General v. Wilson* (f), *Cohen v. Wilkinson* (g), *The East Anglian Railway Company v. The Eastern Counties Railway Company* (h), and *M'Gregor v. The Dover and Deal Railway Company* (i), as decided in the Exchequer Chamber; some, at least, of these were cited at the bar.

With respect to the case of *Hawkes v. The Eastern Counties Railway Company* (k), mentioned more than once during the argument, and which was affirmed by the then Lord Chancellor (l), I will only say, that I still entirely adhere to my judgment in that case; from which, neither when concurring with Lord Cranworth in deciding the cases of *Webb v. The Direct London and Portsmouth Railway Company* (m), and *Lord James Stuart v. The London and North Western Railway Company* (n), have I intended to depart, nor have I, as I believe, in the slightest degree departed at any time.

TURNER, L. J., after stating the facts of the case, proceeded as follows:—

The agreement being under the seal of the three Companies, the plaintiffs are of course *primâ facie* entitled to a decree for specific performance. It rests upon the defendants, therefore, to displace that right. They have succeeded in doing so in the Court below, upon the ground that the agreement has not yet come into operation; and I will first, therefore, examine that question.

(a) 10 Ves. 294.

(b) Jac. 178.

(c) 1 Jac. & W. 74.

(d) 2 Atk. 400.

(e) Gow on Partnership, App. p. 398.

(f) 1 Cr. & Ph. 1.

(g) Ante, Vol. 5, p. 741.

(h) Ante, p. 227.

(i) Ante, p. 150.

(k) Ante, p. 188.

(l) Lord St. Leonard's.

(m) Ante, p. 9.

(n) Ante, p. 25.

question, as it seems to me, depends upon the true meaning to be given to the words "during the continuance of such lease authorised to be granted by such Act," which are contained in the first clause of the agreement of the 12th of October, 1847. It is to be observed, that the words are "during the continuance of any such lease;" from this form of expression it is, I think, to be collected that the parties had in contemplation, that there might be some lease other than the lease in perpetuity, which is first mentioned in the agreement. The words "during the continuance of any such lease" could hardly be intended to refer solely and exclusively to a lease, if granted, which was to endure for ever. To what, then, do these words refer? This, I think, is to be gathered from the recitals of the agreement: It recites, that a bill was introduced into Parliament for a lease in perpetuity of the undertaking of the Shropshire Union Railways and Canal Company to the London and North Western Railway Company, and that it was opposed by the Shrewsbury and Birmingham Railway Company. [His Lordship read the recital in the agreement (a).] Then it recites the passing of the Act, and the operative part is as I stated.

The agreement therefore recites, that the covenants to be entered into "upon the Act being obtained authorising such lease as aforesaid"—that is, a lease in perpetuity of the undertaking, or a lease between the parties of any part of the said undertaking between the Shrewsbury and Stafford; and, though I agree that the effect of the covenants cannot be measured by the event which the covenants were to be entered into, I think that the recitals of the agreement must be referred to for the purpose of explaining the meaning of the prepositional term "such;" and I think, upon the true construction of that agreement, that the word "such"

(a) Ante, p. 537.

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has reference to the recital which I have mentioned; the covenant, therefore, contained in the first clause of this agreement must be read as if the words had been "during the continuance of any lease in perpetuity of the undertaking, or any lease between the same parties of any part of the undertaking between Shrewsbury and Stafford." The covenant, therefore, runs thus:—That the Shropshire Union Railways and Canal Company shall and will, from time to time and at all times hereafter during the continuance of any lease in perpetuity of the undertaking, or of any lease between the same parties, or of any part of the undertaking between Shrewsbury and Stafford, authorised to be granted by such Act, make and keep a separate account. It is evident from the mention of such a lease in the original recitals of the agreement, that the parties contemplated that there might be a lease of part of the undertaking between Shrewsbury and Stafford before a lease of the entire undertaking; if they had considered that the Act, which had then passed, and was before them, warranted no lease except a lease of the entire undertaking, why was any mention made of any lease of the part between Shrewsbury and Stafford?

But, when we have surmounted this difficulty, and have settled that the covenant is to be read "during the continuance of any lease in perpetuity of the entire undertaking, or of any lease between the same parties of any part of the undertaking between Shrewsbury and Stafford authorised to be granted by such Act," a further question arises, what is the meaning of these latter words "authorised to be granted by such Act?" Do they mean, during the continuance of any such lease as Parliament has in express terms enacted may be granted, or do they mean during the continuance of any lease which may be granted consistently with the provisions of the Act. The latter, I think, is the true meaning; for the parties, as I have before observed, contemplated that there might be a lease of part. It is said, however, that Parliament has, by the

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Act, expressly negatived the granting of any lease except upon conditions which have not been fulfilled; and the 31st section of the Act is relied upon in support of that position. [His Lordship then read the 31st section (a).] But I think that this section does not bear out the argument in support of which it is adduced. That section, as I understand it, refers to the lease of the whole undertaking. It appears to me to have been inserted to meet the words, "or at such earlier period as may be agreed upon," which are contained in the 1st section; for by that section it is enacted, "that on the completion of the works of the railways by the said recited Acts authorised to be made, so as to be opened for public traffic, or at such earlier period as may be agreed upon by the said Companies." Now, if these words had stood alone, a lease might have been made of the entire undertaking at any time; and I read the 31st section as operating upon the words which are there contained, and precluding the execution of any lease of the entire undertaking until the requisites of that section had been complied with, by a certificate that half the capital had been expended.

I think, therefore, that the 31st section applies only to the lease of the entire undertaking, and being thus removed out of the way, I think that under the earlier sections of the Act which prescribed the terms on which the London and North Western Railway Company were to hold each of the lines, when completed and opened, and the rents which they were to pay for the same, a lease of any one of the lines when completed and opened might well be granted, and would be consistent with the provisions of the Act.

The conclusion to which I have arrived on this part of the case is, I think, much strengthened by reference to the arrangement which it was intended to carry out by the agreement in question, which refers to the traffic being con-

(a) Ante, p. 536.

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veyed without any mention of any lease being granted; and this shews that what the parties were looking to throughout was the power of carrying along the line, which would certainly arise upon the Shrewsbury and Stafford line being completed.

For these reasons I feel most reluctantly compelled to differ from the Master of the Rolls upon the point upon which he has dismissed this bill; but I do so with less reluctance, as he himself differed from Lord *Cottenham* on that point, and my opinion coincides with that of Lord *Cottenham*.

If this case had rested upon the simple point of whether the agreement had come into operation, I should have thought the plaintiffs entitled to relief. But a further point was argued upon the part of the defendants, that this agreement ought not to be enforced, upon the ground of public policy; and I proceed therefore to consider that point.

In determining questions of this nature, Courts of justice, as I apprehend, are bound to consider, not what in their judgment may be most for the interest of the public, but what was the scope and object of the law which is said to be infringed or attempted to be infringed. What we have here to consider, therefore, is, what was the scope and objects of the Acts of Parliament from which these Companies and other Railway Companies (for there is nothing in this respect peculiar to these Companies) derive their power. The great undertakings of these Companies could not be carried into effect by private enterprise alone, and Parliament, therefore, with a view to the public good, authorised the constitution of large bodies, acting by directors, for the purpose of carrying them out. But these bodies have no existence independently of the Acts which create them; and they are created by Parliament with special and limited powers and for limited purposes. Whether Parliament has wisely limited their powers for the purposes of their incorporation, is not for us to consider. The

fact of their being endowed with such powers, and incorporated for such purposes only, shews that Parliament did not think fit to entrust them with more extended powers, or to incorporate them for other purposes. When, therefore, they exceed or attempt to exceed their powers, or to go beyond the limits of their incorporation, they are acting in contravention of the law which created them, and in opposition to that which Courts of justice are bound to consider to have been the object of Parliament in their creation.

Again, Parliament has given these Companies power to interfere with private property, and has empowered them to levy tolls; and it has protected the public against any undue interference on their part with private property. It has also secured to the public the benefit of their expenditure by limiting and restricting their powers. And how is it consistent with the protection thus thrown around the public that they should be permitted to transgress the limits which Parliament has provided for the public security?

These are the principles, or some of the principles, which I think must be applied to this case, considered with reference to the question of public policy; and I will now consider what is the effect of the agreement which has been entered into between these parties, and whether it contravenes these principles.

The effect of this agreement, as I understand it, is, that the Shrewsbury and Birmingham Railway Company are to receive seven-thirteenths of what shall be determined by auditors to be the due proportion of the whole monies received by the London and North Western Railway Company for the carriage of any passengers or goods from Shrewsbury or Wellington or any intermediate place to Rugby or to the south of Rugby, which is attributable to the distance from the point of departure to Stafford; and that the London and North Western Railway Company are, on the other hand, to receive six-thirteenths of what shall be determined by auditors to be the due proportion of the whole

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monies received by the Shrewsbury and Birmingham Railway Company for the carriage of any passengers or goods from Shrewsbury or Wellington or any intermediate place to Rugby, or to the south of Rugby, which is attributable to the distance from the point of departure to Wolverhampton. And, applying to this the principles to which I have referred, it must be asked, where are the powers of the Company to enter into such an arrangement? It cannot, I think, be denied that they could not alienate the whole of their tolls. Upon what principle, then, can they alienate the tolls on a given portion of their line, or any portion of such tolls? It is said, this is merely matter of arrangement, but it is not less an alienation of the tolls because it is matter of arrangement.

Again, these Companies are incorporated with reference to the carriage of passengers and goods between particular places. Where is their power to contract for an interest in the carriage of passengers and goods between other places? It was urged, indeed, on the part of the appellants, that these Companies were not bound to be carriers at all, but that circumstance does not appear to me to help the argument; for this argument proceeds upon the assumption of both parties being carriers; and even if it did not, I see nothing in the circumstance of the parties not being bound to carry, which could warrant their entering into such an arrangement as this.

It was then said, however, that, although these considerations might affect the question as to what has been termed "the thorough traffic," the subject of the first and second clauses of the agreement, they could not apply to what has been called "the local traffic," the subject of the third clause. But I think this argument also fails as against the appellants, and that the appellants cannot avail themselves of it. Assuming that these Companies are not bound to be carriers, I very much doubt whether, being carriers, they can legally stipulate that they will not carry between particular places upon their lines. But,

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even assuming that they can, I think that this agreement, being in other respects against public policy, cannot be enforced.

Much stress was laid in the argument upon the circumstance of the respondents having obtained the consideration for the agreement by the withdrawal of the opposition to the bill. But when this Court refuses to interfere upon principles of public policy, it acts with reference to the interests of the public, and not with reference to the conduct of individuals; and I do not think that we should be justified in relieving the appellants upon this particular ground. The appellants, when they agreed upon the terms on which they would withdraw their opposition to the leasing bill, should have taken care that the terms were not such as to infringe the law.

Great reliance was also placed in the argument upon the opinions of Lord *Cottenham*, and, as it was said, of the Court of Queen's Bench, in favour of the validity of this agreement. But the cases upon this subject have taken a much wider range since the opinion of Lord *Cottenham* was pronounced; and I have not been able to satisfy my mind, that, in the intricacy of the proceedings at law, this particular question was fairly submitted to the consideration of the Court of Queen's Bench. At all events, the other cases which were cited in the argument seemed to me to be at variance with the opinions said to have been expressed by that Court; and, upon the principle of those other cases, and for the reasons I have given, I am satisfied, that, looking at this case with reference to the question of public policy, this Court ought not to decree specific performance of this agreement, or to grant the relief which is prayed by this bill.

It is unnecessary, therefore, for me to enter into the grounds of defence which were urged on the part of the respondents, the more so as I do not think they furnish any substantial answer to the appellants' case. My opin-

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ion is, that this appeal must be dismissed, but without costs.

The bill being dismissed, the motion must of course be dismissed also; and it remains only, then, to consider the appeal by the London and North Western Railway Company in the second cause. On this head I have little to add to what has been said by my learned Brother, without reference to any other question affecting the agreement sought to be enforced in the second clause, and the circumstances under which it was entered into. I think the specific performance of it ought not to be decreed. It was attempted to justify this appeal upon some supposed necessity for presenting it, in order to bring forward the facts as a defence to the other suit; but I do not think the appeal was necessary, even if it could be used for any such purpose, which I doubt, as it was presented in the second suit only. I concur, therefore, in the opinion, that the appeal in the second cause should be dismissed with costs.

Some discussion then ensued as to the action at law brought by the plaintiffs in consequence of the liberty given in Lord *Truro's* judgment; but his Lordship, *Knight Bruce*, said, that he considered the action to be a mere creature of the Court, brought in a stage of the cause when it might have been and probably was prudent to direct it; and he ordered, that, as matters had now taken a different course, it should be stopped without any costs on either side.

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J. W. PERKES, deceased, and THE LANDS CLAUSES CONSOLIDATION ACT, 1845, and THE SOUTH STAFFORDSHIRE RAILWAY ACT.

Nov. 9th.

HIS was a petition presented by the trustees of the will of J. W. Perkes, deceased, and the tenant for life under that will, stating, among other things, that certain parts of freehold and copyhold lands devised for the benefit of the petitioners, and also a part of other lands devised by the same will were required by the South Staffordshire Railway Company for the purposes of their estate; and that, in March, 1847, the Railway Company entered and took possession of such land under the 85th section of the Lands Clauses Consolidation Act, 1845, and paid the sum of 940*l.* into the Bank of England as the estimated value of the land taken, and delivered to the trustees of Mr. Perkes the usual bond under the common seal of the Company, with two sureties.

That afterwards, on the 2nd of August, 1849, the petitioners, on behalf of themselves and all other persons whomsoever, having any estate or interest in the property, except the yearly tenant, agreed to sell the fee simple and inheritance of certain pieces of land (part of the lands of which the Railway Company had taken possession) for 684*l.*; and the vendors covenanted that they would, at the expense of the Company, deduce a good title thereto; and that, on payment of the consideration money, they, the vendors, and all other necessary and proper parties, would

A Railway Company took possession of land under their compulsory powers, but previously to the payment of the price, they entered into an agreement for purchase with persons alleging that they had a good title, and that they could convey free from incumbrances. The consideration money was fixed at an entire sum for the whole. It afterwards appearing that the alleged owners of the whole could only make out their title to a part, the Railway Company paid the entire sum into Court, under the 69th section of the Lands Clauses Consolidation Act; this sum was apportioned, and the va-

of the land to which a good title could be made was stated by affidavit. The vendors then presented a petition, praying that the sum apportioned to them might be carried over to a separate account, that the dividends might be paid to the tenant for life. The Court ordered the sum apportioned as the value of that part of the land to which a good title could be made to be carried over to the account of the petitioners, and the dividends to be paid to them, the principal not to be paid without notice to the Railway Company.

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convey the said premises, free from all incumbrances, to the Railway Company.

That, in October, 1849, the petitioners delivered to the Railway Company their abstracts of title to the land, the subject of the agreement; and in July, 1850, the Railway Company presented a petition to the Court; whereon, the Railway Company undertaking within a certain time to pay into Court, under the 69th section of the Lands Clauses Consolidation Act, the purchase monies of the land mentioned in the petition, an order was made that the sum of 940*l.* cash should be paid to the South Staffordshire Railway Company; and under this order they obtained payment out of Court of the sum so originally paid in by them.

That afterwards, on the 3rd of February, 1852, the Company paid the sum of 684*l.*, the purchase-money of the land comprised in the first agreement, into Court, under the 69th section of the Lands Clauses Consolidation Act (*a*); and it was by a subsequent order duly invested, "In trust, in Ex parte The South Staffordshire Railway Company, the account of the 684*l.* paid in pursuant to undertaking."

That the land in question consisted partly of freeholds and partly of copyholds, and that the petitioners were, without dispute, able and willing to execute to the Company an immediate conveyance of the freeholds and also of one moiety of the copyholds, but were not able, without the concurrence of the heir-at-law of N. E., to execute a good and effectual conveyance of the other moiety of the copyholds.

It was also stated by the petition, and affirmed by affidavit, that, according to a valuation which had been made of the premises of which the 684*l.* was the purchase-money, the sum of 162*l.* 10*s.* ought to be apportioned as the value of the freeholds, and 521*l.* 10*s.* as the value of the copyholds.

(*a*) This section provides for the payment of purchase-money into Court where the parties are under disabilities.

the petition prayed, that on the petitioners undertaking to convey the freeholds and a moiety of the copyholds, the sum apportioned as the value of the freeholds, and a moiety of the sum apportioned as the value of the copyholds, should be carried over to an account to be intitled "The Account of the Trustees of J. W. Perkes' Will," and that the dividends might be paid to the tenant for life, and that the dividends of the purchase-money representing the moiety of the copyholds might be accumulated.

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. Bacon and Mr. Cole for the petitioners.

. Follett and Mr. Kinglake, for the Railway Company, argued that the fund in Court ought not to be placed under the control of the petitioners until they had fully completed their contract by a perfect conveyance of the moiety of the land included in the contract. That if the fund were placed under their control, or the dividends payable to them, they would have no inducement to be active in procuring a complete conveyance for the company. That the Court could not bind the interest of the adverse claimant of one half of the copyholds; and that the fund in Court could not be dealt with in his absence without rendering the Railway Company liable to a demand in respect of the land to which he laid claim, and in respect of which no title could be made.

THE VICE-CHANCELLOR.—The question involved in this case is one of some difficulty and of considerable importance; but it has been argued so fully, and I may say ably, on both sides, that it has enabled me to make up my mind upon the order which I ought to pronounce; and I will, therefore, at once dispose of it.

The facts are as follow:—The Railway Company took possession of certain freehold and copyhold hereditaments, under their compulsory powers; and, being in posses-

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sion, they afterwards entered into a treaty with the petitioners for the purchase of the entirety of the land so taken, and the purchase-money to be paid for the whole was settled by agreement; and the petitioners contracted and agreed to convey the fee simple free from incumbrances. It turns out that they have a good title as to the freeholds and as to a moiety of the copyholds; but as to the other moiety of the copyholds, they have not a good title. The purchase-money, as settled by the contract, was paid into Court under the 69th section of the Lands Clauses Consolidation Act, and is now in Court, together with the dividends which have accrued due thereon—the capital representing the land, and the dividends the rents and profits of that land. It appears, by the discussion, that the defect in the title as to the moiety of the copyholds is not one of conveyance merely but an actual defect, for a claim to the beneficial interest has been set up and prosecuted at law by an individual other than the petitioners.

Under the ordinary exercise of the jurisdiction of the Court in cases of defective title, if the defect extended to a substantial part of the land included in the contract, and could not be the subject of compensation, the Court would not enforce the contract, and the vendor would have back his estate and the purchaser his purchase-money, if paid; but the effect produced by the legislative powers given to Railway Companies, and by their manner of dealing with the land, is to take this out of the ordinary rule applicable to vendor and purchaser, for the Court cannot annul the contract nor restore the parties to the position they were in before it was entered into. The Company have a right to retain possession of the land, and the Court cannot restore it to the vendors. This being so, the parties, whose title is admitted to be good as to all the freehold land and as to one moiety of the copyholds, ask the Court that the dividends of that part of

urchase-money which represents their property may
id to them. This appears to me to be a just demand,
ne which I cannot refuse, unless I hold that I have
isdiction over the fund in Court.

w, with reference to so much of the purchase-money
presents the interest of the heir-at-law, it has been
nded, that I cannot, in any manner, bind him as to
mount of his interest, by apportioning any specified
or allotting any aliquot part of the whole purchase-
y as representing the value of his interest; and one
e objections taken by the respondents is, that I have
isdiction whatever to treat him as a party to this pe-
t, and that the order which I made, to serve him with
y of it, is altogether inept and nugatory.

is true I may have no jurisdiction to adjudicate as
e value of the interest of the heir-at-law, but I could
reat him as an uninterested person; and the service
e petition on him, which I ordered, had this effect at
, that it gave him an opportunity of asserting any
he might have with reference to the fund in Court, if
ought proper to assert it. Therefore, I cannot hold
order of service to be inept or improper; and I must
this meaning to his non-appearance, that he is indif-
t as to the manner in which I deal with this fund.

this state of the case, it seems to me improper to
hold from the petitioners the enjoyment of so much
e principal sum in Court as clearly represents the
to which a good title has been shewn, and I feel it
luty, if I can arrive at a proper apportionment, to
them the benefit of it.

is quite true, I must not prejudice the right of the ad-
e claimant or the rights of the Company by my deci-
, but what the petitioner does offer is to convey the
holds and a moiety of the copyholds; and upon the
ution of such a conveyance, I am bound to order a
per proportion of the purchase-money to be paid to

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them. Now, as I cannot, as I have before said, annul the contract and place the parties in the position in which they were previously to the contract, I think a proper proportion of the sum in Court should be set aside for these petitioners and, as they ask, be carried over to a separate account out of the control of the Railway Company. It is true that the contract is for one entire sum; but a valuation of the petitioners' interest has been made, and the evidence has fixed the amount; and I may add, that the respondents have not in any manner questioned the accuracy of that valuation. I will, therefore, make the order as prayed; but the principal must not be paid out of Court without notice to the Railway Company.

It has been contended that the petitioners have not done all in their power to make a conveyance to the Railway Company, and that they were bound to do something with reference to the claim of the heir-at-law. They have done something, but I do not say they might not have done more; but what have the respondents done? They, being in possession of the whole of the land the subject of this dispute, and knowing the defect in the title as to half of the copyholds, apply to the petitioners, and, according to the evidence, recommend an action of ejectment to be brought against them as to one moiety of the copyholds. This course may create, and probably will create, litigation; but if the respondents have thought proper to commence it, they must pay the costs which ensue. In my opinion they have been too active. The costs appear to me to have arisen from the exercise of the compulsory powers of the Company to take land; and it is probable that if the Company had not so taken it, the petitioners might have acquired a good title by adverse possession, and rendered any proceedings unnecessary, which is another reason for my ordering them to pay the costs.

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BEFORE VICE-CHANCELLOR STUART.

AUBREY'S ESTATE AND THE SOUTH WALES RAILWAY *June 27th.*
 ACT.

THIS was a petition presented by Sir Thomas D. Aubrey, the tenant for life of certain lands taken by the South Wales Railway Company under the provisions and for purposes of their Act, with which the Lands Clauses Consolidation Act was incorporated, praying for the payment of the purchase-money; and also praying a reference to the Master to tax, as between solicitor and client, all such costs, charges, and expenses properly incurred by the petitioner in and about the surveying and valuing of the lands in question, and in and about and preparatory to reference to arbitration and taking of the lands by the Company as were not payable by the Company, and that the amount of such costs might be paid out of the purchase-money.

A tenant for life refused a sum of money offered by a Railway Company as the value of lands taken for the purposes of their Act, and required the amount to be settled by arbitration. The umpire awarded a less sum than that offered. The costs of the tenant for life with reference to the arbitration ordered to be paid out of the purchase-money.

It appeared by the statements in the petition that the Railway Company had, after taking possession of the land under the powers of their Act, served the tenant for life with a notice of their intention to summon a jury to assess the value, but at the same time made an offer of £ for the land and for consequential damage. The tenant for life, acting under advice, refused the offer as inadequate, and called on the Railway Company to proceed to assess the value by arbitration. The arbitrators met, but not agreeing, the matter was left for the decision of the umpire, who awarded 2107*l.* as the value. By the 11th section of the Lands Clauses Consolidation Act, if arbitrators award a less sum than has been offered by the promoters of the undertaking, each party is to bear its own costs incident to the arbitration; and the costs of

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the arbitrators are to be borne by the parties in equal proportions.

The question now arose, whether the costs of the petition and incident to the arbitration were to be paid out of the purchase-money, such costs having been incurred by his refusal to accept a sufficient offer by the Company: or whether he was to bear them personally.

Mr. W. D. Lewis, for the petitioner, contended, that the course the tenant for life had pursued was with the view of benefiting the parties interested in remainder as well as himself and that the case came within the provisions of the 73rd section (a) of the Lands Clauses Consolidation Act, and that the Court had full power under that section, or at all events under the 78th section (b) of the same Act, to make the order as prayed.

Mr. Karslake, for the Railway Company, submitted, that this was not a case within the provisions of the 73rd section: and that the petitioner must pay his own costs, as the proceedings before the arbitrator had been caused by his own act and at his own risk.

(a) The words of the 73rd section, applicable to this case, are as follow:—

“That it shall be in the discretion of the Court of Chancery in England, to allot to any tenant for life for his own use, a portion of the sum paid into the Bank as compensation for any injury, inconvenience, or annoyance which he may be considered to sustain, independently of the actual value of the lands to be taken, and of the damage occasioned to the lands held therewith by reason of the taking of such lands and the making of the works.”

(b) The 78th section enacts:—

“Upon the application by petition of any party making claim to the money so deposited, the said Court of Chancery in England may, in a summary way, as to such Court shall seem fit, order such money to be laid out or invested in the public funds, or may order distribution thereof, or payment of the dividends thereof, according to the respective estate, titles, or interests of the parties making claim to such money, or any part thereof, and may make such other order in the premises as to such Court shall seem fit.”

The VICE-CHANCELLOR declared his opinion to be, that the costs were in the discretion of the Court; and that, as the petitioner had acted in a manner which, as he was advised, would be most beneficial to those interested in the remainder, it would be hard to make him pay the costs of the arbitration.

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Re
AUBREY'S
ESTATE.

BEFORE THE MASTER OF THE ROLLS AND THE LORD
CHANCELLOR.

SANDERSON *v.* THE COCKERMOUTH AND WORKINGTON RAIL-
WAY COMPANY.

1849.

Jan 27th;
Feb. 5th, 6th,
11th, & 12th;
April 4th;

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Jan. 19th.

THE bill in this case prayed the specific performance of an agreement, bearing date the 2nd of March, 1846. The Railway Company was incorporated by an Act, 8 & 9 Vict. c. cxx.; and, by the 1st section of that Act, it was enacted, that the Companies Clauses, the Lands Clauses, and the Railways Clauses Consolidation Acts, should be incorporated with it. By the agreement in question, the plaintiff agreed to sell to the defendants so much and such parts of the lands &c. as he, the plaintiff, could, by virtue of the defendants' Act, or otherwise, lawfully agree to sell, and as should be required by the said Company, "subject to the making such roads, ways, and slips for cattle as might be necessary, for the sum of 352*l.*" And it was (amongst other things not material to the question at issue,) agreed, that the defendants should not be liable to make or pay any further or other compensation to the plaintiff, for any

A Railway Company agreed with a landowner to purchase so much of his land as they required for their railway at a certain sum, "subject to the making of such roads, ways, and slips for cattle as might be necessary."

The railway severed a portion of the plaintiff's land, and the Company made a crossing on the level, and a cattle-creep under their line.

The plaintiff, at content with these communications, filed his bill, contending that he was entitled to a bridge over the railway, and to another crossing also. On the hearing of the cause, *held*, by the Master of the rolls, and decree confirmed by Lord Chancellor, that the Court had jurisdiction to provide for the specific performance of such an agreement under the direction of the Court, and directed a reference to the Master.

That a refusal to refer the question in dispute to a tribunal other than the Court of Chancery will not influence the Court in determining the question of costs in favour of or against the party refusing.

The principles which regulate the Court as to costs in cases of specific performance of this nature, considered.

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damage done to any other lands and grounds, unless notice should be given as therein provided; and that, if the defendants, in using the lands &c. thereby contracted to be sold, should injure or damage other lands of the plaintiff, he was to give the defendants notice; and if they could not agree as to the amount of compensation to be paid for such injury or damage, it was provided that the matter should be referred to two indifferent referees, one to be named by the plaintiff and the other by the defendants, and an umpire.

The line of the defendants' railway passed through a close called Botland, and severed a part of it, lying to the north of the railway, which abutted on the river Derwent from that part lying to the south of the railway, but did not sever it from any other portion of the plaintiff's land. Owing to the uneven surface of the close called Botland, the line of the railway was formed principally by means of a cutting, ranging from a level to the depth of sixteen feet.

The defendants completed a level crossing for carts and carriages over the railway, and a creep for cattle and other animals sufficient to allow the passage of the common carts of the country, when not top laden, under the railway. The plaintiff, being dissatisfied with the crossing and creep, claimed to have a bridge constructed over the railway, and a cattle creep also; and his bill charged that a bridge was necessary.

The defendants offered to submit the matters in difference to arbitration.

On the 19th of March 1847, the plaintiff filed his bill, and applied for an injunction to restrain the defendants from opening their railway for traffic until they had made such track ways and slips for cattle as were necessary for the convenient occupation of the plaintiff's lands, and until they had made a bridge over the railway. But upon the Company submitting further to perform the agreement in such manner as the Court should at the hearing of the

cause direct, in case the Court should direct such further performance, no order was made on the motion.

Mr. Roupell and Mr. Renshaw, for the plaintiff, contended, that the plaintiff was entitled to a specific performance of his contract; and that the Court would lend its aid to compel the Railway Company to do all such acts as were required to satisfy the terms of the agreement: *Pembroke v. Thorpe* (a), *Price v. The Corporation of Pen-sance* (b), *Storer v. The Great Western Railway Com-pany* (c). That the whole question in dispute was inde-pendent of the provisions of the defendants' Act, or of the general Acts of Parliament, and that the plaintiff could not pursue his remedy under them; but if it were other-wise, the equitable jurisdiction was not excluded by the special remedy: *Sheriff v. Coates* (d), *Coats v. The Clarence Railway Company* (e), *Kemp v. The Brighton Railway Company* (f).

Mr. Turner, Mr. Malins, and Mr. Borton, for the Rail-way Company, contended, that the agreement was, in fact, in accordance with the terms of the Act, under which the Railway Company were incorporated; and that all the pro-ceedings of the contracting parties, and of the plaintiff to sell, must be regulated by that Act. That the power of the Company to purchase was entirely derived out of the Act, and that the Court had no jurisdiction to interfere. That the jurisdiction of the Court was taken away by the Railways Clauses Consolidation Act, which provided a tri-bunal to determine and give compensation for all damage to any road by the formation of a railway: (section 58). That if any jurisdiction did exist in the Court of Chan-cery, it would only be to refer the matter to justices, in the same manner that it would send a question to a Court

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(a) 3 Swanst. 437, n.

(b) 4 Hare, 506.

(c) Ante, Vol. 3, p. 106.

(d) 1 Russ. & My. 159.

(e) Id. 181.

(f) Ante, Vol. 1, p. 495.

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of law. That all necessary communications, within the meaning of the agreement, had already been provided for the plaintiff; and that if, as was to be expected, they were not perfectly convenient, the compensation given for severance was intended to be the price of the inconvenience to which the plaintiff would be put by the formation of the railway. That where a legal provision is made for certain works by Act of Parliament, the insertion of words into a contract, giving no more than what is provided for by the Act, confers no greater benefit than the Act contemplates; and if the Company have satisfied the terms of the Act, they have also satisfied the terms of the contract: *De Visse v. De Visse* (a). That the obligation to make the communications within the terms of the Act was the only onus thrown on the contracting party; and that if the plaintiff was dissatisfied, he must find his remedy by proceedings under the provisions of the Act. That the case of *Storer v. The Great Western Railway Company* was different from the present, in that the contract was to do something not included in or provided for by the general Acts. The cases of *Skerratt v. The North Staffordshire Railway Company* (b) and *Dudley v. Hartley* (c) were referred to.

Mr. Rowpell replied.

The MASTER OF THE ROLLS.—In this case I have very considerable difficulty in determining what ought to be done between the parties. I am now of opinion, that this instrument of the 2nd of March, 1846, is, in its construction or under the circumstances of the case, one in respect of which the Court has jurisdiction to decree specific performance; and that it is not merely an obligation arising under the Act of Parliament. The question before me is, whether the agreement has been fully performed, or whether any further performance of it is required. This ques-

(a) 1 H. & T. 406; and see p. 419.

(b) Ante, Vol. 5, p. 166.

(c) 4 L. J., Chanc., 104.

tion is one as difficult as any which can come under the consideration of the Court. [His Lordship then entered into the details as to the communications which had been provided, and the possibility of making a bridge as required by the plaintiff; and, after recommending that the parties should come to terms, said, that, if they failed to do so, he should probably adopt the course suggested by Mr. *Turner*, viz. direct a reference to the Master, to inquire what would be the necessary communications.

His Lordship then ordered the matter to stand over, with a view to the parties effecting a compromise.

The parties having failed to come to terms, on this day the MASTER OF THE ROLLS delivered the following judgment:

I have already stated my opinion that the plaintiff is entitled to the assistance of this Court in obtaining specific performance of his agreement; and although it is difficult to determine the mode of executing it, the Court must not on that account refuse to exercise its jurisdiction in the matter. The railway of the defendants severs the plaintiff's land, and divides it into two parts. Under the agreement the plaintiff is entitled to have such roads, ways, and slips for cattle as may be necessary. The word "necessary" must receive a reasonable interpretation, having regard to the circumstances and situation of both sides; and I must construe it with reference to what is proper to be done by one for the convenience of the other: I consider the expression to mean such roads, ways, and slips for cattle as might be necessary and proper for convenient communication between the several portions of the plaintiff's land. The plaintiff requires a bridge to be erected, and the defendants have provided a dead level, crossing over a part of the railway which is not constructed in a cutting, and a cattle creep very near to it. I do not think that the plaintiff is entitled to the bridge which he claims; and the defendants do not appear to me to be entitled to a declaration that the crossing and the

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cattle creep which they have provided are such as the plaintiff is bound to accept. No reasons have been stated to me for failure of the compromise; and regretting very much that I have to refer such a matter as this, I must make an order to the Master to inquire what roads, ways, and slips for cattle are necessary and proper for the purpose of obtaining and preserving a convenient communication between the portions of the plaintiff's land which are severed by the railway.

From this decision the defendants appealed.

Mr. Roupell and *Mr. Renshaw* in support of the decree.

Mr. Malins and *Mr. Borton* contra.

The LORD-CHANCELLOR (without hearing a reply):—In this case the parties have agreed among themselves for the purchase by the Railway Company of certain lands belonging to the plaintiff. It is a private agreement, which, it is true, takes notice of the Act, but only does so for the purpose of shewing the authority which the party purchasing had to deal with the subject-matter of the contract. [His Lordship then read the words of the agreement.]

This is in all respects a mere contract between vendor and purchaser, the only difference between this and any other contract being, that the party contracting derives his authority to do so from an Act of Parliament. The party selling contracts that the purchaser shall be subject to the making such roads, ways, and slips for cattle as may be necessary. The Company, by virtue of this contract, get possession of the plaintiff's land and make their railway. Then disputes arise as to the communications made by the Company. It is for the Master to consider whether the plaintiff ought to have been satisfied with that which was given to him, or whether he is justified in requiring more. At all events, the parties have a right to call on this Court to exercise its

isdiction in the matter, and to ask that the agreement, far as it remains unperformed, may be performed on part of the Company. [His Lordship then referred to submission made by the defendants on the motion for injunction (a).]

The submission on the part of the defendants left the question of jurisdiction open, and they had a right to contend that the plaintiff could not ask for a decree, and that the bill might be dismissed.

If, however, the Court does assume jurisdiction, then it must undertake the duty of seeing that the contract is fully performed between the parties. This precludes the argument so far as it is attempted to shew, that, although the Court entertains jurisdiction over the contract, it ought to leave that particular jurisdiction about roads, &c. to the justices appointed under the general Act.

Now, these Acts, the particular and the general Acts, do not mean to interfere with the private contract between the parties. The Company being once constituted, and having a capacity to purchase, they may deal within the limits of their Act as they may think fit. If they do not, and if they cannot make such a contract as they think expedient by private treaty, then the Acts give them the means of compelling owners to part with their land on certain terms. The provisions of the Acts refer to the cases of compulsory purchase, and do not interfere at all with the capacity of the Company to purchase by private contract. Here the parties have not professed to act under the authority of their parliamentary powers, except so far as they derive their authority to purchase under them.

The defendants have obtained from the plaintiff the performance of the contract, by taking possession of the land and applying it to their purposes: is not this Court to interfere to secure to the person so parting with his land, the confidence that the contract would be performed, the equivalent which he has bargained for? There is no-

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(a) See ante, p. 614.

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thing which creates in my mind any doubt as to the jurisdiction of this Court to compel specific performance of such a contract: but, if it were otherwise, I can find no specific provision in the Acts regulating the mode in which ~~private contracts~~ entered into between Railway Companies and individuals are to be carried into effect; and, if that be so, they must necessarily be carried into effect in the same manner as other contracts.

There are cases provided for by the Act in which justices have jurisdiction; but, supposing that they had such jurisdiction in cases of private contract, this Court has also jurisdiction. But that is not the case here: so that there is nothing to take away the original jurisdiction of this Court, to see that the party who has sold his land shall be secured in the enjoyment of the easements for which he has contracted. None of the cases referred to were cases of private contract, and therefore do not apply to the present case. This being so, the Court has, in my opinion, adopted the right course, by decreeing that the contract shall be specifically performed under the direction of the Court, and by directing a reference to the Master to inquire into the matter, instead of, at the hearing, entering into such details as whether a transit over a railway is or is not made in the most convenient manner. That is properly left to the discretion of the Master, who, after he has heard, not only what has been proved, but what each party may, in the detail of the inquiry, be able to bring forward before him, will be enabled to come to a right conclusion on the matter. It is the course and practice of this Court, that matters of this nature should be the subject of inquiry before the Master, and not be considered by the Court at the original hearing on the evidence then before it. Being therefore of opinion that there is no ground for this appeal, I must dismiss it with costs.

In pursuance of the decree, the Master made his report in July, 1851, and thereby found, among other things, that the level crossing and cattle creep made and then existing over and under the railway, with the additions and alterations thereafter mentioned to be made thereto, and to be maintained by and at the expense of the Company, were all the roads, ways, and slips for cattle which were necessary and proper or required for the purpose of obtaining and preserving a convenient communication between the portions of the plaintiff's land which were severed by the defendants' railway, that was to say, a good and substantial roadway, 6 ft. wide, to be protected by a fence as therein mentioned.

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On this day the cause came on to be heard, on further directions, before the Master of the Rolls(a).

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Mr. Roupell and Mr. Renshaw for the plaintiff.

Mr. Malins, Mr. Lloyd, and Mr. Borton for the defendants, the Railway Company.

On the subject of costs, the following cases were cited: *Long v. Collier*(b), and *Scoones v. Morrell*(c).

THE MASTER OF THE ROLLS.—This is a suit for the specific performance of a contract. The principles by which the Court is governed in respect of the costs of such suits are well laid down in the cases to which I have been referred, and I must adapt those principles to the particular facts of the case before me. Now, I find, that, on both sides, claims have been made in the suit and at the hearing, which cannot be supported. The plaintiff contended,

(a) Sir J. Romilly.

(b) 4 Russ. 269.

(c) 1 Beav. 251.

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that he was entitled to a bridge, and also to another communication: but the Court has determined that he is not so entitled. On the other hand, the Company contended that the Court had no jurisdiction, and that the plaintiff must be left for his remedy to the provisions of the Acts of Parliament. On these points, each party was in error.

I may state that it is no ground for giving costs in favour of one party or against another, that the one has offered and the other has refused to refer the matter in dispute to a tribunal other than the Court, if he was entitled to come to the Court; and that, consequently, the offer made by the defendants, (which I regret was not accepted by the plaintiff,) is not a ground for refusing him costs, if he is otherwise entitled to them.

The case which I have to consider is this: the contract being that the defendants should give to the plaintiff "such roads, ways, and slips for cattle as might be necessary," whether, in fact, the defendants did that which would satisfy the terms of the contract before the filing of the bill, or whether they, in fact, failed to do so. The defendants stated, by their answer, that they had, before the filing of the bill, provided a sufficient crossing and cattle creep. The Master has, by his report, found that the crossing and cattle creep already made are not sufficient, unless with certain additions and alterations. Now, I cannot enter into the question whether this or that thing is of a greater or less degree of moment in this matter; what I must consider is, whether the Company had, prior to the filing of this bill, provided communications which the plaintiff was bound to accept as sufficient under the agreement. The Master has not found that a sufficient crossing and cattle creep had been provided, and accordingly, as matter of technical form, the plaintiff is entitled to a decree for providing the alterations and additions which have been found necessary.

If the matter had stood there, the plaintiff would have

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been entitled to his costs of the suit. If, on the other hand, the defendants had offered to provide what was necessary before the institution of the suit, and had only been prevented from carrying them into effect by reason of the plaintiff claiming something to which it is afterwards found he is not entitled, then, following the principles of the cases to which I have been referred, I might have given the defendants the costs of the suit. I do not find, however, that the defendants offered to remove the defects complained of, although pointed out to them by the plaintiff in a letter of the 12th January, 1846. That then was part of the issue between the parties at the time of the institution of the suit; and in that respect the plaintiff has succeeded, though in other parts he has failed.

It is, indeed, possible for me to do what has been suggested by counsel as a last resort, viz. refer it to the Master to apportion the costs with respect to that part of the case in which the plaintiff has failed, and those parts in which he has succeeded; but I believe, that, if I were to pursue such a course, the expense would exceed the gain to either party.

All, therefore, I shall do is to make the formal decree for making the additions and alterations in the terms of the Master's report, and to give no costs on either side. There will be no further directions; but liberty to apply in case the additions or alterations are not completed.

May 1842.

THE ATTORNEY-GENERAL & THE LONDON AND
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A Railway
Company. In
the progress of
their works
were liable to
the crossing
a carriage road,
and in consequence
of the road,
which, in the
opinion of the
Court, was not
an interference
for passengers
and carriages
as the road in-
terfered with
as nearly as
as might be.
The Court
granted an in-
junction to re-
strain the Com-
pany from cross-
ing, breaking-
up, cutting
through, or in
anywise inter-
fering with the
turnpike road
until a suffi-
cient road, with-
in the terms of
the Railways
Clauses Consol-
idation Act,
had been pro-
vided.

THIS was a motion for an injunction in the
proper of an information filed by the Attorney-
General against the trustees of a turnpike road
Kingston-upon-Thames to Sheetbridge, near
Hampshire, against the above-named Railway
Company, praying that the Railway Company might be
by injunction from crossing, breaking up, cutting
or in any manner interfering with the turn
which the relators were trustees, or the con
or the traffic thereon, until they should have
made and appropriated for the use of the pi-
cient road over the proposed railway, as con-
passengers and carriages as the then turnpike
nearly so as might be; and that, if necessary,
ants might also be restrained from proceeding
erection of a bridge over the railway, in the
mentioned, and the approaches then in con-
struction, and from carrying the turnpike road
proposed railway by means of such bridge
approaches.

The question in this case turned upon whether the Railway Company were, in their proposed
causing a sufficient road to be made, as con-
passengers and carriages as the road interfered
as nearly so as might be, within the meaning
and 56th sections (a) of the Railways Clauses
Consolidation Act.

(a) Sect. 53 enacts, that, "If in or the special Act
the exercise of the powers by this found necessary

effect of the evidence is given in the judgment of the Vice-Chancellor.

Bacon and Mr. *G. L. Russell*, in support of the motion relied on the Company's not having complied with the provisions of the Railways Clauses Consolidation Act, in that the substituted road was not so convenient as it was the former road to make it; and contended, that the Court had no jurisdiction to interfere by injunction in order to protect public interests: *Kemp v. The London and Brighton Railway Company* (a), *Reg. v. Scott* (b).

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shall not raise, sink, or use any road, whether carred, horse-road, tram-road, or any other way, either public or private, so as to render it impassable, dangerous, or extra-ordinarily inconvenient to passengers or carriages, or to the use thereof; and the Company shall, before the commencement of any such operation, cause a sufficient road to be made instead of the road so to be interfered with, and at their own expense, on such substituted road, in as near a state as convenient for passengers and carriages as the former road, so interfered with, or as near thereto as may be."

The 16th section enacts, that, if any road so interfered with can be restored compatibly with the provisions of the Act, the same shall be restored to as near the same condition as the same was in at the time when the same was interfered with by the Company, or as near thereto as may be, if such road cannot be

restored compatibly with the provisions of the Act, the Company shall cause the new or substituted road, or some other sufficient substituted road, to be put into a permanently substantial condition, equally convenient as the former road, or as near thereto as circumstances will allow; and the former road shall be restored, or the substituted road put into such condition as aforesaid, as the case may be, within the following periods after the first operation on the former road shall have been commenced, unless the trustees or parties having the management of the road to be restored, by writing under their hands, consent to an extension of the period, and, in such case, within such extended period; (that is to say) if the road be a turnpike road, within six months, and, if the road be not a turnpike road, within twelve months."

(a) Ante, Vol. 1, p. 495.

(b) Ante, Vol. 3, p. 187.

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Mr. Russell and Mr. Wickens, for the Railway Company, contended that the proposed road was as convenient as it was possible for the Company, under the circumstances of the case, to make it; and that it satisfied the requirements of the Railways Clauses Consolidation Act. And secondly, that the Court would not grant an injunction which must necessarily be so vague in its terms, that it would be impossible for the Company to know when and how they may proceed with their works without committing a contempt of Court. That the case of *Cotter v. The Midland Railway Company*(a) shewed the disinclination of the Court to grant general injunctions not defining the limits of the authority within which the parties enjoined were authorised to act.

On the suggestion of the Court, a proposal was made by the counsel for the turnpike trustees, that the Railway Company should adopt a certain mode of proceeding with their works, which, in their opinion, would be free from objection; but this proposal was met by a counter-proposition on the part of the Company, to leave the matter to the decision of an indifferent person.

The parties having failed to come to terms,

The VICE-CHANCELLOR delivered the following judgment:—The Court is compelled (for the decision is forced upon it) to come to the best conclusion it can, with the materials before it, upon the question, whether, in their proposed works or work, the Company, in the exercise of their powers, are doing as little damage as may be, or whether it can be said, that the road intended to be substituted for that taken away would, in the language of the 56th section, be “equally convenient as” the former road, or as near thereto as circumstances will allow.

The impression made on my mind by the evidence is,

(a) Ante, Vol. 5, p. 187

the Company are not doing as little damage as may be, and that the road which they propose to substitute is not so convenient as the former road, or as near thereto as the circumstances will allow. They are intending that the new road, in my view of the facts and the law, is a wrong; and that is a wrong which I understand it to be the duty of the Court to restrain. It has been said by counsel on the other side, and perhaps justly, that all that the Court can lawfully decide upon this motion is, that what the company are doing is not that which the Court thinks right; whilst counsel on the other side, that the Court ought to point out to the company what they ought to do. I do not see how this difficulty is to be avoided. I can only state the reasons which induce the Court to come to its conclusion, and point out the manner in which it appears to the Court that the evil may be remedied.

Now, the ground on which I proceed is, that the proposed plan of the company is to make a curve or curves in the substituted road inconveniently and unnecessarily sudden; and that this suddenness might be removed, the curve or curves rendered easier, without imposing on the company any unreasonable or heavy expense, or extraordinary difficulty.

There appear to me two ways of avoiding the inconvenience (judging as well as I can on a subject upon which I am bound to form an opinion), either by increasing the width of the surface at the ends of the approaches to the bridge, in the manner suggested by the relators, or by other works of a slight description accompanying the bridge (according to my present opinion, subject to the opinion of the relators' counsel may say,) I consider the company are not bound to provide; or, if the Company do not think fit to adopt that course, by lengthening the new portions of the road and by acquiring more land for that purpose from the common, they may make

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the curve sufficiently easy and convenient for the public without altering or adding to the bridge.

Because I think that that which is required by the public convenience may be effected by one of these ways, I am of opinion that the present injunction should be granted, not, however, in the exact terms of the notice of motion, but in the following form:—That the defendants be restrained from crossing, breaking up, cutting through, or in anywise interfering with the Sheetbridge turnpike road, or the communication thereof, or the traffic thereon, until they shall have caused to be made and appropriated for the use of the public a sufficient road over the railway, as convenient for passengers and carriages as the present turnpike road, or as near thereto as may be, or until further order; without prejudice to any application by either party to the railway commissioners under the Act; with liberty to apply.

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BEFORE VICE-CHANCELLOR TURNER.

ENS v. THE SOUTH DEVON RAILWAY COMPANY.

*Trinity
Vacation.*

was a motion by the holder of certain original shares in the South Devon Railway Company, for an injunction to restrain the Company and the directors from carrying into effect a proposed scheme for the commutation of certain guaranteed shares, or declaring or paying dividends thereon, under the circumstances detailed in the statement of the Vice-Chancellor.

Verdict for the plaintiff.

Hall for the defendants.

The plaintiff was the holder of original shares in a Railway Company. By Act of Parliament, new half shares were created, in respect of which 6l. per cent. was guaranteed for ten years, and other privileges were given; no interest had been paid on these shares for many

years, and a large unsecured debt, in addition to bond and mortgage debts, had been incurred by the Company. The plaintiff filed his bill, and moved for an injunction to restrain the directors from paying any preferential interest or dividend on the half shares, while any of the unsecured debt remained due, except out of the clear and divisible profits of the current half year.

In answer to the motion, the Company undertook to do nothing contrary to the notice of motion until the cause or further order, unless under the authority of Parliament.

By an Act passed in 1851, power was given to issue shares to the amount of certain cancelled shares, and it was enacted that the money so raised should be applicable to the general purposes of the Company, with a proviso that the existing debts of the Company, or their mortgage or bond should be paid thereout, and the guarantee on the half shares commuted, on certain conditions.

The defendants, in pursuance of the provisions of the Act, prepared a scheme for the commutation of the half shares, whereupon the plaintiff filed a supplemental bill, alleging that the scheme was not in conformity with the Act, and praying an injunction against the directors to restrain them from proceeding to carry the scheme into effect, and also from paying or declaring any dividend on any shares while any of the unsecured debt remained due, except as therein mentioned.

The scheme having been submitted to and approved by the shareholders, the plaintiff moved for an injunction.

The defendants also moved to be discharged from their undertaking.

The plaintiff contended that although the Act did not contain any authority which would take the case out of the jurisdiction, the defendants had the power nevertheless of moving to discharge it; and that, under the circumstances of the case, they were entitled so to move, exactly as if an injunction in the nature of an undertaking had been granted as of course.

The plaintiff contended that the undertaking by a Company not to do anything without the authority of Parliament, was a covenant entered into most strictly against the Company; and they cannot be relieved from it, except by a formal act of Parliament, or by necessary conclusion drawn from the words of the Act.

The plaintiff had not made out a sufficient case for the interference of the Court by injunction. The holders of half shares were entitled to the payment of their dividends out of any funds of the Company, which could be lawfully applied to it, before the holders of the original shares.

The question of payment of dividends to shareholders, while any debt of the Company remained due, was a matter of internal arrangement, to be settled by the majority of the shareholders.

The principles applicable to private partnerships, as to the division of profits whilst there are debts due, are in matters of this sort also applicable to public Companies.

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 THE SOUTH
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Upon the argument of the motion, it was agreed that the case should be considered as if a counter-motion were made on the part of the defendants to discharge an undertaking made by them on the 24th of February, 1851, to the effect that they would not do anything, unless under the authority of Parliament, contrary to the notice of motion, until the hearing of the cause or until further order.

The VICE CHANCELLOR.—There are two classes of shares in this Company: the original shares, and the half shares. The original shares are 50*l.* shares, and represent the original capital of the Company, which for the purposes of the present motion may be taken to have been one million sterling. The half shares of 25*l.* each represent the sum of 500,000*l.* increased capital, authorised to be raised under one of the Company's Acts. The half shares were created on the 15th of March, 1847, and have a guarantee or privilege attached to them, the resolution of the directors, by which they were created, being in the following terms:—

“That 6*l.* per centum per annum be guaranteed until the 15th of March, 1857, upon all calls duly paid, and upon all sums received in contemplation of calls by authority of the board of directors in respect of such half shares; and that the said guarantee shall not exclude the shareholders from participation in any higher rate of dividend for the time being, payable on the whole shares.”

It appears that no dividend or interest has been paid either on the half or on the original shares since 1848; and in 1850 the Company in addition to a mortgage and bond debt to the amount of 478,166*l.*, created under the power of its Acts, had incurred a floating and unsecured debt to the amount of 97,000*l.* or thereabout. In this state of circumstances a bill was introduced into Parliament in the Session of 1850, for enabling the Company to raise by the creation of new shares a further capital, to be applied in liquidation of the mortgage and bond debt, and

the floating and unsecured debt, and as to 50,000*l.* for other purposes; and by this bill it was proposed, that the future income of the Company should be applied, first, in payment of the interest of the debts and of the shares created for the liquidation of them, and then in payment not only of the preferential dividend guaranteed to the half shares, but of the arrears and any future deficiency of such preferential dividend, without reference to the period or half-year when such deficiency occurred. The plaintiff is a very large holder of original shares in the Company; and upon the above application to Parliament being made, he filed his bill in this Court, by which, it was amended, after alleging amongst other things that the effect of the resolutions, by which the half shares were created, was that the clear and divisible profits of the current half-year were to be the only fund for the payment of the preferential dividend; and that the profits of the half-year were not to be liable or applicable to make good the deficiency of such preferential dividend in the previous half-year; that the holders of the half shares were not entitled to the preferential dividend out of any profits derived from increased capital; and that the directors had in hand profits of the past year, which ought to be applied, first, in payment of the floating and unsecured debts, and then in payment of a dividend upon the shares of the Company during the period in which such profits were earned; but that the directors intended to apply the profits in payment of the arrears of the preferential dividend, and that such payment would be illegal. The bill sought an injunction to restrain the Company and its directors from paying any interest or dividends on the half shares in preference to dividends or interest on the original shares of any profits derived from any other capital than that which, at the date of the resolutions creating the half shares, had been or could be raised under the provisions of the Company's Acts; and from paying any preferential interest or dividends on the half shares while any

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of the floating or unsecured debt was unpaid, except out of the clear and divisible profits of the current half-year, properly applicable to the payment of a dividend, and so far as such profits might be sufficient for the purpose.

The defendants having put in their answers to the original bill, and thereby stated their intention to apply the clear profits in hand in paying to the holders of the half shares the preferential dividend upon such shares for the half-years which had elapsed since the shares were created, the plaintiff, on filing the amended bill, gave notice of motion for the injunction prayed by it.

The motion came on upon the 31st of July, 1850, and was ordered to stand over until Michaelmas Term, the defendants undertaking not to declare or pay any dividend in the mean time; and the motion, having again come on in Michaelmas Term, was again ordered to stand over till Hilary Term, upon an undertaking by the defendants in the terms of the notice of motion.


The defendants then put in their answers to the amended bill, by which they stated, that, until the arrangement after mentioned was entered into, they had considered that the profits which they had in hand were applicable to the preferential dividend, including the arrears; and that the capital debt ought to be provided for by the creation of new shares, or otherwise, as Parliament might sanction; but they never intended to apply them in payment of interest or dividend until such time as the capital debt was so provided for; and that, in fact, nearly all the profits which they had in hand had been applied towards payment of capital debt: such application having been considered as a temporary loan, to be repaid as soon as, under the authority of Parliament, monies for that purpose should have been provided. They then referred to a report of the directors, recommending the arrangement with the holders of half shares, which had since been adopted under the provisions of the Act of Parliament obtained in the then last session; and to a resolution of the

shareholders approving the report, and authorising the directors to apply to Parliament for powers to give effect to the recommendation. And they stated, that it was not intended to apply any profits to the payment of interest or dividend so long as any capital debt remained unpaid, unless Parliament should give the Company such powers as would justify such application. And in one of the answers there was a passage to the effect, that it was not intended to apply any profits to the payment of the preferential dividend until the capital debt had been fully paid off.

The motion again came on after the filing of these answers; and on the 24th of February, 1851, an order was made upon it, by which the defendants, undertaking that the order should be without prejudice to any question between the parties, and also undertaking to do nothing, unless under the authority of Parliament, contrary to the notice of motion, until the hearing of the cause, or until further order, it was ordered, that the plaintiff should be at liberty to amend his bill.

In pursuance of the liberty given by this order, the plaintiff re-amended his bill, and thereby prayed an injunction against the payment of the preferential dividend only, whilst the floating or unsecured debt should remain due and unpaid, or unprovided for.

The defendants, by their answer to the re-amended bill, stated that the unsecured debt amounted to upwards of 100,000*l.*, and that the assets available for payment of it were under 20,000*l.*; that it could only be paid off by the creation of new capital, by the authority of Parliament, or by applying the profits, after keeping down the interest on the mortgage and bond debt, to that purpose; and that they intended to apply such profits accordingly, unless and until some other provision should be made by Parliament for that purpose; and they also stated, that the balance of profit remaining in hand, after payment of the interest of the mortgage and bond debt, was 789*l.* 19*s.* 7*d.*,

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which was meant to be applied in payment of the unsecured debt, subject to any provision Parliament might make for the payment; and further, that the balance of profit on the next account would be applied as Parliament might sanction, and in default of such parliamentary sanction, in liquidation of the unsecured debt of the Company.

At this point, the proceedings in the original suit terminated; but the bill, which was introduced into Parliament in the session of 1850, having been rejected, the defendants, in the last session of Parliament, applied for and obtained an Act (a), by which, after providing for the creation of shares or stock in the place of a like amount of the mortgage and bond debt, it was enacted, section 7, that, subject to the rights of the holders of the shares or stock created or to be created as therein mentioned, in place of the like amount of "the mortgage and bond debt" of the Company, it should be lawful to commute the guarantee and privilege attached to the half shares into any other guarantee or privilege, whether perpetual or terminable, which might be agreed upon in manner after mentioned, as an equivalent for such existing guarantee and privilege, and to attach such new or altered guarantee and privilege to such half shares, or to any stock into which the same might at any time be converted; but it was (by section 8) enacted, that no commutation of half shares should be made under the powers of the Act, unless and until a scheme setting forth the particulars thereof, and especially the fixed or rateable dividend proposed to attach to the half shares, or to the stock into which they might be converted, in substitution for the 6l per cent. so guaranteed, and the privileges, if any, to be secured to the holders thereof, should have been sent to each shareholder, nor without the concurring votes of the holders of at least four-fifths of the whole shares, and of the holders of at least four-fifths of the half shares respectively,

(a) 14 & 15 Vict. c. liii.

nted at a meeting to be convened by the directors
 purpose of taking the scheme into consideration;
 proviso that such consent, if given, should be bind-
 d conclusive on all the shareholders in the Company.
 After providing for the cancellation of the 2000 unis-
 hares in the original capital, and of certain other
 which had been surrendered or forfeited, it was, by
 12, enacted, that, subject to the provisions of the
 he Company might from time to time create and
 shares in the stead and to the nominal amount of
 ncelled shares; and that the monies raised thereby
 l be applicable to the general purposes of the under-
 ; authorised by the Company's Acts; with a proviso
 re existing debts of the Company, other than the
 age and bond debt, should be paid thereout.

Act contained further provisions (a) as to the
 to be thus created; that the Company should
 by the creation of them, increase the capital of
 000%. which they were authorised to raise; that 20%
 ent. on the amount of each share should be the
 st amount of any one call, and two months at
 the interval between successive calls; and that the
 gate amount of calls on any share in any year
 l not exceed four-fifths of the nominal amount of
 hare; that the shares should not be created with-
 ie consent of, at least, four-fifths of the votes of the
 holders present at a meeting of the Company, to be
 ally convened for the purposes of determining as to
 creation; with a proviso that the consent, if given,
 d be binding on all the shareholders: that the holders
 e shares should be entitled in respect thereof to a
 in number of votes, but should not in respect thereof
 any vote as to the commutation or conversion of the
 shares; and that, subject to the provisions of the Act,
 Company might issue the shares at such times, and of

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such amounts, and in such classes, and bearing such interest or dividend, preferential or otherwise, and with such privileges, and on such terms and conditions, and generally in such manner as the Company, with the consent of four-fifths of the votes of the shareholders present at a general meeting, to be specially convened for that purpose, should determine.

In pursuance of the provisions of this Act, the directors of the Company prepared and issued a scheme for the commutation of the half shares, by which it was proposed that the existing guarantee or privilege attached to those shares should be commuted as follows:—That each half share should bear a fixed dividend in perpetuity, at the rate of 10s. 9d. per annum, payable half-yearly, in priority to all other dividends except on shares or stock created in substitution for the mortgage or bond debt; that the substituted guarantee and privilege should take effect from the 15th September, 1850; that the first payment in respect thereof should be a dividend, at the rate aforesaid, for the half-year ending the 15th of March, 1851; and thereafter, that the fixed dividend should be paid half-yearly; that the substituted guarantee and privilege should be received in full satisfaction of all arrears and future payments of interest originally guaranteed on the half shares, and in satisfaction of all further claims thereon to the 15th of March, 1857; but that, in case the surplus net revenue should permit a dividend to be made in respect of the 50l. shares, exceeding 6l. per cent. per annum, the commutation should not exclude the holders of the half shares from participating in the surplus rateably with the holders of the 50l. shares; and that, after the 15th of March, 1857, the holders of the half shares should, in addition to the fixed dividend of 10s. 9d. per half share, be entitled to the same rate of dividend per cent. as that which might from time to time be declared in respect of the whole shares.

This scheme appears to have been founded on the report

of an actuary, that the 10s. 9d. per half share in perpetuity was equal in value to the 6l. per cent. originally guaranteed for the period of ten years during the part of that period for which it had not been paid.

Notice having been given of an extraordinary meeting, for the purpose of taking this scheme into consideration, the plaintiff filed a supplemental bill, by which, after alleging that the Act of the last session did not contain any provision authorising the profits of the undertaking to be divided among the shareholders by way of dividend, so long as any of the capital or unsecured debt remained unpaid or unprovided for; and that the payment of any dividend out of profits, whilst the debt was unpaid, would be a breach of duty on the part of the directors and a violation of the undertaking; and further alleging, that it was uncertain whether the new shares would be issued, and, if issued, whether they would be taken; and that the profits ought not to be divided until a fund should have been actually obtained for payment of the unsecured debt; and also alleging, that the proposed scheme was not authorised by the provisions of the Act, and that it was beyond the authority of the directors to propose and of the meeting to confirm it: the plaintiff prayed an injunction to restrain the Company and the directors from in any manner acting on or giving effect to the proposed scheme for the commutation of the privilege or guarantee attached to the half shares; and from paying or declaring any commuted or other dividend on any of the original or half shares in the Company, while any of the unsecured or floating debt remained due and unpaid, and except out of the clear and divisible profits of the current half-year for the time being, properly applicable to the payment of a dividend, and so far as such profits, after payment of such debts, should be sufficient for that purpose.

The plaintiff now moved for an injunction in the terms prayed by the supplemental bill. The motion was, in

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the first instance, made before the scheme for commutation had been submitted to the shareholders according to the provisions of the Act; and it then stood over in order that it might be laid before the shareholders, and to afford the plaintiff the opportunity of considering its effect, it having been suggested, that the adoption of the scheme would enable an immediate dividend to be made on the original as well as on the half shares.

The scheme having been submitted to the shareholders and approved by them, but being still objected to by the plaintiff, the motion was again brought on and argued; and, upon the argument of the motion, it was agreed, that the case should be considered as if a counter-motion on the part of the defendants to discharge the undertaking of the 24th of February, 1851, had come on with the motion for an injunction.

The case, therefore, must be considered in three points of view: first, whether the Act of last session contains any such authority of Parliament as will take the case out of the undertaking; secondly, whether, if the case be within the undertaking, the defendants are entitled to be relieved from it; and thirdly, whether, if the undertaking be put out of the case, the plaintiff is upon the merits entitled to the injunction.

As to the first point, I am of opinion, that the Act of last session does not contain any such authority as will take the case out of the undertaking, for it must be construed most strongly against the parties by whom it was given; and I think that authority, by positive enactment or by necessary conclusion from the other provisions of the Act, is required to take the case out of its reach; and that it is not sufficient for that purpose that Parliament has not prohibited the payment of the dividend, or may have contemplated that it might be paid consistently with the provisions of the Act.

It was argued, that Parliament must have intended the

dividend to be paid, because it has appropriated the capital to be raised by the new shares, which is payable only by instalments, to the payment of the floating or unsecured debt, and has made no provision for recouping the profits if applied in the payment of it; and again, because the new shares are postponed to the half shares, and if the dividends are not paid upon the half shares, no dividends can be paid on the new shares; but these arguments lead to no certain conclusion. There may be difficulties in carrying out the Act which may not have been foreseen; but I cannot impute to Parliament the intention to authorise, by the Act, the payment of the dividend out of the profits; as the effect of such a construction would be, either to compel the creditors to wait for payment until funds sufficient for the purpose were raised by means of the new shares, or, if they desired more immediate payment, to drive them upon the stock and assets of the Company, which it was the manifest object of the Act to preserve.

It is necessary, therefore, to consider the case upon the second point, whether the defendants are entitled to be relieved from the undertaking. It was argued, on the part of the plaintiff, that the defendants could not be so entitled unless the Court was of opinion, that what they proposed to do was proper to be done; but I do not think this argument can be maintained. It is true that the undertaking, having been entered into upon the motion being finally disposed of, and being continued in an order which could only be made by arrangement between the parties, may well be considered as an agreement on the part of the defendants; but it is an agreement only to do nothing contrary to the then pending notice of motion, unless under the authority of Parliament, until the hearing of the cause, or until the further order of the Court, terms which do not appear to me to import that nothing contrary to the notice of motion was to be done except under

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the order of the Court. Had this been the intention of the parties, the order would, I think, have been differently worded,—the more so, as express reference is made to the authority of Parliament. I see nothing, therefore, which could have precluded the defendants from asking the opinion of the Court upon the question, whether they ought any longer to be bound by the undertaking, even if the circumstances of the case had remained wholly unaltered; but I think that, at all events, there is enough of alteration in the circumstances of the case to warrant the defendants in calling for the judgment of the Court upon that question; for the profits in hand are now of much greater amount than they were at the period when the undertaking was given; and the power which has been given by Parliament to commute the preferential dividend has afforded the Company better prospects than they then had of raising money for the payment of the unsecured or floating debt. In my opinion, therefore, the defendants have the right to move to discharge the undertaking; and the case must be considered exactly as it would have stood if an injunction in the terms of the undertaking had been granted as of course, and without the matter having been mentioned to the Court, and the defendants had moved to dissolve, and the plaintiff to extend, the injunction.

I proceed, therefore, to consider the question upon the third point, whether, upon the merits of the case, the plaintiff is entitled to the injunction. The case, on his part, appears to rest on three grounds—first, that the holders of half shares are not entitled to profits derived from increased capital; secondly, that the holders of half shares are only entitled to dividends out of current profits, and are not entitled to arrears of dividends out of the profits of subsequent years; and, thirdly, that the earnings of the line cannot be lawfully applied to the payment of the dividend, while the floating or unsecured debt remains unpaid and unprovided for.

As to the first point, it is unnecessary to say more than that the profits now in question are not derived from any increased capital. And, as to the second point, I think, that, as between the holders of half shares and of the whole shares, the holders of the half shares were, upon the construction of the resolution by which those shares were created, well entitled to the 6½ per cent. guaranteed out of any funds of the Company which could be lawfully applied to the payment of it, and therefore out of future profits, before any dividends could be payable upon the whole shares.

This appears to me to be the plain import of the resolution; and the Court would not, I think, be justified in putting a strained construction on it, on behalf of the holders of the whole shares, at whose instance and for whose benefit the half shares were created. If this part of the case had depended upon the construction of the resolution, there would not, in my opinion, have been sufficient doubt upon it to have justified the Court in interfering by injunction; but I think, that, independently of the question of construction, the Act of last session having authorised the commutation of the guarantee, and the commutation having been made with the consent required by the Act, the point must be considered to be at rest.

The remaining point to be considered is the payment of the dividend, whilst the floating or unsecured debt is unpaid, and which, except by the power to create new shares, is unprovided for. I am of opinion that the Court ought not, on this ground, to interfere by injunction. I think that the clause relating to dividends, which is contained in the Company's first Act, and which was referred to in this branch of the argument(a), is to be considered as

(a) 7 & 8 Vict. c. lxxviii. s. 128, shall cause a scheme to be prepared, shewing the profits (if any) of the Company for the pe-
enacts, "that, previously to every ordinary meeting, the directors

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directory. It does not point out the manner in which the profits are to be ascertained, or in what manner the scheme by which they are to be shewn is to be prepared. If such a clause were inserted in a deed of partnership between a limited number of individuals who had agreed to bring in capital by instalments, I think the majority of the partners could overrule the minority upon the question whether profits should be divided while the debts of the partnership were unprovided for; and the principles which apply to partnerships limited in number, apply also to these great Companies. I think, also, that the question upon the third point is one of internal management, with which the Court cannot interfere; and that the case of *Browne v. The Monmouthshire Railway and Canal Company*(a) goes far to govern the present.

It was attempted in the first instance to support the plaintiff's case on the ground that the proposed scheme for commutation was ultra vires; but, on my intimating an opinion unfavourable to that view, the point was not further pressed, and I think no weight is due to it. The plaintiff's counsel also, in the argument, relied much upon the statements in the answers as to the intention of the defendants, and the state of the Company's affairs, and the alleged invalidity of a resolution which appears to have been passed for the creation of the new shares; but I think that the defendants have not, by their answers, precluded themselves from disputing the right to the in-

riod current since the immediately preceding ordinary meeting, and apportioning the same or so much thereof as they may consider applicable to the purposes of dividend among the shareholders, according to the shares held by them respectively, the amount paid thereon, and the

periods during which the same may have been paid, and shall exhibit such scheme at such ordinary meeting; and, at such meeting, a dividend may be declared according to such scheme."

(a) 13 Beav. 32, and post.

ction. For the reasons above given, I do not think it necessary to enter upon the other points.

Upon the whole, therefore, I am of opinion, that the undertaking ought to be discharged, and the injunction dissolved. It must not, however, be understood that I give any authority for the payment of the dividend. I discharge the undertaking upon the ground that the defendants are entitled to the opinion of the Court, whether the injunction should be granted; and I refuse the injunction, upon the ground that the plaintiff has not made out a sufficient case for the interference of the Court. The costs of the action must be costs in the cause.

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THE GREAT NORTHERN RAILWAY COMPANY v. THE EAST-
ANGLIAN COUNTIES RAILWAY COMPANY.

Sept. 16th.
(in Vacation.)

THE terms of an agreement entered into between the plaintiffs and the defendants, dated the 29th of May, 1849, were in part as follow:—That in order to obviate the necessity of constructing a line from Peterborough to Wisbeach, and in consideration of the abandonment of the line, the defendants granted unto the plaintiffs, their successors and assigns, that, thenceforth and so long as certain lines therein mentioned should not be constructed, the powers for making which had expired,) and for ever in case the same should never be constructed, it should

The Company (plaintiffs) entered into an agreement with the Company (defendants), whereby the plaintiffs were to have the right of using certain portions of the defendants' railway, and their stations, conveniences, &c. The plaintiffs afterwards entered into an

agreement with the East Anglian Railway Company, whereby the latter Company, without legislative sanction, delegated for a term all their rights over their railway, &c. to the plaintiffs. The defendants being prejudiced by the latter agreement, obstructed the plaintiffs in the user of that portion of their line, which was connected with the East Anglian Railway, thereby depriving the plaintiffs of the benefit of their agreement.

The plaintiffs filed their bill, and moved for an injunction to restrain the defendants from obstructing the passage of the plaintiffs over their line:—*Held*, that the agreement between the plaintiffs and the East Anglian Railway Company was in itself illegal; and that the Court would not interfere in a case where the effect of its interference would be to extend and facilitate the objects of an illegal agreement.

But, where Railway Companies have entered into agreements as to passing over each other's lines, the rights of the parties must depend on the terms of the agreement, and can no longer be governed by the provisions of the Railways Clauses Consolidation Act.

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be lawful for the plaintiffs, their successors and assigns, to have and exercise full and free right to run their trains with their own engines to and fro over those parts of the lines of railway belonging to the defendants which lay between the Great Northern Railway at or near Peterborough and the Eastern Counties Railway Station at Wisbeach; and also to use all the stations, watering-places, sidings, and other conveniences upon or appertaining to the same lines, and free ingress, egress, and regress for all agents, servants, workmen, and other authorised officers of the plaintiffs, in, to, and from such parts of the said railway stations and appurtenances of the defendants as might be necessary or convenient for the conduct and management of the trains and traffic of the plaintiffs working on and over the same; and that the times and manner in which the engines and trains of the respective Companies should run over the portions of the line thereinbefore authorised to be used by the engines and trains of the plaintiffs, should be settled as therein mentioned; and that the plaintiffs should pay the defendants, in lieu of tolls and charges, 60% out of every 100% they should actually receive from traffic; and that the defendants should, by their servants and officers, give to the plaintiffs all such and the same facilities and assistance at their several stations and off the same, along the parts of their line which might be traversed by the trains of the plaintiffs, as was usually given, and as should, for the time being, be actually given to their own traffic of the same class or character.

It was stated by affidavit, that, by an agreement (a) entered into between the plaintiffs and the East Anglian

(a) The agreement of the plaintiffs with the East Anglian Company (the effect of which is given in the Vice-Chancellor's judgment, post, p. 648), gave rise to

the opposition on the part of the defendants, in the following manner: The defendants had, previously to the date of the agreement between the East

Company, dated the 16th of May, 1851, that it agreed that the plaintiffs might and should, on as therein mentioned, during twenty-one years 2nd of June then next, work over the said Anglian Railways, and receive the tolls and charges, the railways, works, and conveniences of the East Railway Company.

plaintiffs filed their bill, praying an injunction to the defendants from obstructing the passage of coaches, carriages, and trucks of the plaintiffs to and from the junction of the East Anglian Railway with the Eastern Counties Railway, near Wisbeach, and from any act whereby the plaintiffs might be hindered or obstructed in passing freely to and fro between the Eastern Counties Railway, near Wisbeach, and the East Anglian Railways.

It appeared for the plaintiffs.

It appeared for the defendants.

JUDGE-CHANCELLOR.—This case was argued before the court on two grounds—first, that, under the provisions of

the Great Northern Railway Company, availed themselves of that portion of the East Anglian Railway which connects Lynn-Regis, to open communication between that place and London; but the Great Northern Railway obtaining the command of the East Anglian Railway acquired a direct communication with Lynn Regis, Peterborough and Wisbeach, enabled to divert the

traffic from the Eastern Counties line, so as to compete with and probably to secure to themselves the whole traffic between London and Lynn. It then became of the utmost consequence to the Eastern Counties Company to prevent, by every means in their power, the direct communication between Peterborough and Lynn, which they effected by preventing the user of the junction between their line and the East Anglian Railway at Wisbeach.

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the General Railway Acts, the plaintiffs were entitled, independently of any agreement between them and the defendants, to pass over the Eastern Counties Railway, between Peterborough and Wisbeach, and thence on to and over the East Anglian Railways; and, secondly, that, whether they were so entitled or not independently of their agreement with the defendants, they were so entitled under that agreement.

The plaintiffs did not attempt to derive to themselves any rights under their agreement with the East Anglian Railway Company, or to rely upon that agreement further than as evidencing the consent of that Company to the use of their lines by the plaintiffs.

The argument on the part of the plaintiffs, upon the first point, was rested entirely upon the 92nd section of the Railways Clauses Consolidation Act, 8 Vict. c. 20, which, it was said, converted all railways into public highways, and was not controlled by the 87th section of the same Act, giving powers to Companies to enter into agreements as to passing over each other's lines; but, whatever may be the right construction of the Act in those respects, agreements have, in this case, in fact been entered into with each of the Companies over whose lines the plaintiffs claim the right to pass; and I think, that, where such agreements have been entered into, the rights of the parties can no longer be governed by the provisions of the Act, but must depend on the terms of the agreement. I am of opinion, therefore, that the plaintiffs cannot maintain their case independently of their agreement with the defendants.

With respect to the second point, which, indeed, was mainly relied on by the plaintiffs, I think that, upon the true construction of the agreement, the plaintiffs are entitled to pass over the Eastern Counties Railway on to the East Anglian Railway, and to use the Eastern Coun-

es Railway for that purpose. The recitals in this instrument shew, that it was intended to grant some powers and rights beyond the power of using the Eastern Counties railway, from Peterborough to March and Wisbeach; and the grant itself is not merely of the right to pass to and over those parts of the lines of railway belonging to the Eastern Counties Railway Company, between the Great Northern Railway at Peterborough and the Eastern Counties Railway station at Wisbeach (terms which may themselves well be construed to give the right to pass over any part of the lines), but also of the right to use all stations, watering places, sidings, and other conveniences, not merely appertaining to, but upon and appertaining to the same lines, and of the right of access to such parts of the railway, stations, and appurtenances of the Eastern Counties Railway Company, as may be necessary and convenient for the conduct and management of the trains and traffic of the Great Northern Railway Company, working, not merely on, but on and over the same; and this is followed by a covenant on the part of the Eastern Counties Railway Company to give to the traffic of the Great Northern Company the same facility and assistance at their several stations and off the same, along parts of their line which may be traversed by the trains of the Great Northern Railway Company as is usually given, and as shall for the time being be actually given to their own traffic of the same class or character.

The construction contended for by the plaintiffs seems to me, therefore, to be supported both by the recital of the instrument and the terms of the covenant, which, I apprehend, must be construed most strongly against the defendants; and I see nothing in the context to alter that construction.

It was said, indeed, that the Eastern Counties Railway Company had not the right, at the time, to use the junc-

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tion, and could not, therefore, intend to grant any such right; but, independently of the evidence in the case, which I think proves that the junction was in use, I think that the Eastern Counties Railway Company having granted the use of their lines, and of all conveniences upon the lines, cannot object to their grantees' using the conveniences granted, for any purposes for which they may be able to apply them, although they may not themselves be entitled to use them for such purposes.

It was also said, that this junction was beyond the limits of deviation of the East Anglian Railway; but I do not think it is competent for the defendants to raise that objection against their own grant.

If, therefore, this case had rested wholly upon the construction of the agreement between the plaintiffs and the defendants, I should have thought it the duty of this Court to interfere to some extent by injunction; but I think there is at the root of this case a question of public policy, which precludes the interference of the Court. It is impossible to read the agreement between the plaintiffs and the East Anglian Railway Company without being satisfied that it amounts to an entire delegation to the plaintiffs of all the powers conferred by Parliament upon the East Anglian Company. All the stock of that Company is to be taken by the plaintiffs without any obligation to restore it. The plaintiffs are to manage and regulate the railways of the East Anglian Company for the purposes of the agreement; and, although in form it is declared that the instrument shall not operate as a lease or agreement for a lease, it amounts in substance either to one or the other.

It is framed in total disregard of the obligations and duties which attach upon these Companies, and is an attempt to carry into effect, without the intervention of Parliament, that which cannot lawfully be done except

Parliament, in the exercise of its discretion with reference to the interests of the public.

It is true, that the plaintiffs do not found their case on this agreement, and that, whether the injunction granted or not, the agreement remains in force; but not less true, that the interference of the Court will frustrate the object of the agreement, and extend and facilitate its operation; and I think it is the duty of the Court to withhold its interference when called upon to do so in aid of agreements of such a nature.

The opinion, therefore, which I have framed upon the case, depending upon the legality of the agreement between the plaintiffs and the East Anglian Railway Company, I will, if the plaintiffs desire it, send a case for the consideration of a Court of law upon that question; but, if the plaintiffs do not desire to take a case, my order will be, that I refuse the motion. The costs to be costs in the cause.

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BEFORE VICE-CHANCELLOR TURNER, THE LORDS JUSTICE
AND THE FULL COURT OF APPEAL

THE SHEFFIELD UNITED GAS COMPANY v. THE SHEFFIELD
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AND

THE ATTORNEY-GENERAL v. THE SHEFFIELD GAS CONSUMERS
COMPANY.

July 29th;
May 24th:

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Feb. 11th,
14th, & 16th.

Two Gas Companies, amalgamated by Act of Parliament, supplied the town of S. with gas. A third Company, completely registered, but without parliamentary sanction, commenced laying down pipes in the public streets. The amalgamated Companies filed their bill, alleging injury to their pipes, and applied for an injunction:—
Held, by Sir G. J. Turner, V. C., that the plaintiffs, pos-

IN this case, on the 17th of April, 1852, a bill filed by the Sheffield United Gas Company against Sheffield Gas Consumers Company, praying “that the defendants, the Sheffield Gas Consumers Company, its workmen, servants, and agents, may be restrained by order and injunction of this Court from laying down gas mains or pipes, or other works, in or under the streets or highways of the borough of Sheffield, or any of them, and from breaking up or disturbing for that purpose any road or pavement of the said streets or highways, or any of them; and from doing any other act whereby the passage of her Majesty’s subjects along the said streets or highways, or any of them, shall be in any respect obstructed or rendered less safe or convenient, or whereby the mains or pipes, or other works of the said plaintiffs,

possessing no right in the soil, had a sufficient legal remedy for their private injury, and were not entitled to an injunction. That the jurisdiction of Courts of equity to interfere by injunction is founded on the insufficiency of the legal remedy, the equitable being superadded to the legal remedy.

The plaintiffs then changed their bill into an information and bill, alleging public as well as private injury, and again moved for an injunction before Sir G. J. Turner, V. C.; which he refused. —The motion was then renewed, by way of appeal, before the Lords Justices.

Held, by the Lords Justices, that the present case did not call for the special interference of the Court by injunction.

That notice of objection or of opposition does not excuse delay in instituting proceedings.

That a Court of equity is not bound to interfere by injunction in all cases amounting to a nuisance at law.

The plaintiffs again moved for an injunction, on new facts, before the Lords Justices, who agreed that the hearing of the cause and motion should come on together before the full Court. Lord Chancellor and Lord Justice Turner (Lord Justice Knight Bruce dissentiente) refused the injunction; and

Held, that the interference of the Court by injunction is influenced by the degree of nuisance and that the inconvenience to the public in the present case, being of a temporary nature and affecting the general body of the inhabitants, did not call for the special interference of the Court.

That time is an element to be considered in determining a question of injunction, even though the application be by the Attorney-General on behalf of the public.

That the Court recognises no distinction in its dealing with a case of private or public nuisance.

e in any way injured or damaged, until the further order of the Court," &c.

The Company plaintiffs were formed by the amalgamation of two Gas Companies, and incorporated by Act of Parliament, conferring on them the usual powers, amongst others, that of breaking up the pavement, with special provisions for compensation for damage.

The defendants, who were an opposition Company, had not obtained an Act of incorporation, but were completely registered in February, 1852. They had obtained the sanction and support of the corporation of Sheffield; and it appeared that the Company consisted of 2000 shareholders, 1500 of whom were gas consumers; and, on the 14th of April, 1852, the new Company made a report, whereby they stated, that they had authority from the Parish Boards and the sanction of the Board of Highways of Sheffield (constituted under the Act 5 & 6 Will. 4, c. 50), to lay down their mains in the public streets.

The plaintiffs, soon after the projection of the Company, objected, by handbills and notices, to the statements and proceedings of the new Company, and, on the 24th of May, moved for an injunction before the then Vice-Chancellor Sir G. J. Turner.

Sir W. P. Wood, and Mr. Amphlett, for the plaintiffs (a).

Mr. Daniel, and Mr. Terrell, for the defendants.

THE VICE-CHANCELLOR.—My opinion is, that the plaintiffs have not made out a sufficient case to induce the Court to grant an injunction to the extent prayed by this bill. The scope and object of the injunction which is prayed for is, to prevent mischief which it is anticipated will arise to the plaintiffs, the Sheffield United Gas Company, by the works of the Sheffield Gas Consumers Company. The works of the new Company have not yet been proceeded with, and this application is made for an injunction to restrain them from proceeding, so as to stop their works altogether.

(a) The arguments of counsel are given, post, p. 655.

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Now, I take it to be perfectly clear, that it is the duty of this Court, before it interferes by injunction in a case of this description, to be perfectly satisfied that irreparable injury will be the necessary consequence of the act about to be done by the defendants, because the foundation of the jurisdiction of this Court in cases of this description is the equitable superadded to the legal remedy. There is by law a remedy given for any injury which may be done to the plaintiffs by the defendants; and when this Court is called upon to interfere, it is on the ground that the remedy which the law gives is insufficient. It is clear, therefore, that the Court, in cases of this description, ought to be perfectly satisfied, not merely,—as it has been put in argument on the part of the plaintiffs,—that injury will be done, but that that injury will be of a nature and description which will not be adequately compensated by damages at law. Now, in order to test this question, suppose that the works of the defendants had been in operation, and it appeared that casual injury had from time to time been done by them to the Company plaintiffs, and that an application had then been made to this Court for an injunction to restrain the defendants from proceeding with their works on the ground of the injury which those works had done to the works of the plaintiffs. Even in that state of circumstances it would require a very strong case to induce this Court to interfere, before there had been a trial at law by which the right of the plaintiffs to damages against the defendants for the injury done had been established. It must, I apprehend, be a case of continual and recurring injury, fully and clearly made out, which would induce this Court to superadd the equitable to the legal remedy which the parties have for injury done to them.

I think, therefore, it is incumbent on the plaintiffs to make out that the necessary consequence of the acts about to be done by the defendants would be an injury of that nature which this Court will interfere to prevent if the acts had actually been done. Now, how does the evidence

stand in this case? I think there are at least twenty witnesses who state, on the part of the defendants, that these works can be done by them without creating any injury, except, as it is said in the affidavit of Mr. Clegg, trivial or temporary injury, creating trivial or temporary damage. Now, if there be trivial or temporary injury, creating temporary damage, an application to this Court for an injunction, founded only upon that injury, could not certainly be entertained; therefore the affidavits of Mr. Clegg and the other witnesses, in the same terms, are very decisive, in my view of the case, against the granting of this injunction. I think it is the duty of the Court to take care, that these injunctions, which are, in truth, injunctions founded on trespass, be not extended beyond what they have hitherto been. The Court, I think, has gone quite far enough in granting injunctions in cases of trespass upon the ground of irreparable injury, and I think that these injunctions should not be extended to cases where there is mere trivial or temporary damage. I have myself known injunctions of this description upon trespass applied for, and refused on the express ground that the injury was not of that nature which would induce a Court of equity to interfere.

Now, it is said, and it is truly said, that this case in some respects differs from the other cases which have been before the Court, in that the defendants in this case have no legal foundation for the acts they are about to do; but I think that the answer to that argument is—that the parties who are complaining of the acts to be done are not the parties who have the legal right to controvert that question. If the parties who had the ownership of the adjoining soil were applying to this Court for the injunction, on the ground that these defendants were disturbing their soil, that would be another and different question. So, if the Attorney-General were coming here, on the ground of public rights, to restrain these parties from taking up the highways, I can conceive that would be also

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a case of a totally different description. But here the application is, in truth, no more than this—the plaintiffs in this case, having an easement in the soil, are applying on the ground, not of any public or private right in soil which belongs to them, but upon the ground of injury done to them; and by establishing that case, and that case alone, can they entitle themselves to relief. Now, it is said, that great injury will be done to this Company, in the first place, because they will be put to great expense, on account of the necessity of their watching the proceedings and works of the new Company. Now, no doubt they must incur that expense, and no doubt they must be subject to some inconvenience, as everybody who establishes a great work must necessarily be, of watching for the purpose of preventing injury being done; but in doing that they are only watching for their own interests, and I cannot interpose the extreme power of this Court by injunction, on the ground that they will incur expense in protecting the works which they themselves have created.

Then, again, great injury is stated to be likely to occur to the plaintiffs from the loss of gas occasioned by the disturbance of their pipes, and from the necessity of taking up and laying down the streets, and the damage which must be done to the water pipes; and the answer to that is, that this injury may turn out to be of such a description that it may hereafter call for the interference of the Court; but to interfere on the ground that there will be an injury, without knowing the nature and extent of that injury—and upon these affidavits the nature and extent of that injury is stated to be only trivial and temporary—I think it will be carrying the power of the Court beyond what it has been considered right that it should be carried, and beyond what, in my opinion, it ought to be carried.

Now, with reference to the observations which have been made on the legal right to break up the ground, I think the answer to that is, that that is a ground for interference on the part of the public; but the parties are coming here, as

it appears to me, on the ground of private right; and, with regard to the reasons given by the learned counsel, upon which the interference of this Court in these cases is called for, I apprehend the Court generally, though not universally, if there be any legal question in dispute, does not interfere until the right has been established at law. And I am called on to interfere, on the ground that the question cannot be tried at law, when, if it were one that could be tried at law, I should say I would not interfere until it had been tried at law. Upon all these grounds, and the view I have of this case, I am of opinion, without saying in the least degree that there may not ultimately be a case to call for the interference of this Court, that I must refuse this motion, with costs.

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Mr. *Rolt* and Mr. *Amphlett*, in support of the appeal, contended, that the acts of the defendants amounted to a nuisance and a recurring nuisance, over which Courts of equity particularly had jurisdiction: That it was not necessary to go to a Court of law in this case to establish any legal right, as the only proper proceedings at law would be by indictment: That the relators would suffer great private injury by the disturbance of their pipes: That the public would be put to great and constant inconvenience

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by the taking up of the pavement and roads: That the Act of Parliament, by which the Company plaintiffs were incorporated, imposed on them certain restrictions and conditions; and that it was never contemplated that a Company could, by mere registration, acquire the powers accorded only by the legislature to those Companies who had applied for and received their sanction, for the public good. That there had been no laches or delay; and that, even if there had been, in case of injury to the public, it would not be considered so rigidly as in the case of proceedings by an individual.—The following cases were cited: *Walter v. Selfe* (a), *Att.-Gen. v. Cleaver* (b), *Duke of Grafton v. Hilliard* (c), *Crowder v. Tinkler* (d), *Rex v. Ward* (e), *Att.-Gen. v. Johnson* (f), *Haines v. Taylor* (g), *Att.-Gen. v. Forbes* (h), *Elmhirst v. Spencer* (i).

Mr. Bethell, Mr. Daniel, and Mr. T. H. Terrell for the relators, contended, that the delay in proceeding after the dismissal of the bill was fatal to the granting of an injunction: That there was no public injury to be prevented; but that, on the contrary, the public would be greatly benefited by having the monopoly in gas destroyed: That the laying down the pipes would only cause a temporary obstruction, which would be amply compensated by the more certain supply and the reduction in price of a most necessary article.

Mr. Rolt replied.

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KNIGHT BRUCE, L. J.—The case divides itself into two portions, one relating to alleged public right, the other to alleged private right.

(a) 19 L. T. 308.

(b) 18 Ves. 210.

(c) Ambl. (Blunt's ed.) 160, n.

(d) 19 Ves. 617.

(e) 4 Ad. & E. 384.

(f) 2 Wils. Ch. Rep. 87.

(g) 2 Phill. 209.

(h) 2 My. & Cr. 123.

(i) 2 Mac. & G. 45.

To take the latter first:—This bill was filed on the 16th of July last. The Company whose acts it seeks to prevent was notoriously proposed to be formed in the autumn of last year. It was then notorious that the Company so proposed meant to do, if they could, the acts which are sought to be restrained by this motion: but, as I have said, the bill was not filed till July. Now, it has been, I think, taken for granted, of late more generally than the authorities warrant, that if there be notice of an objection, it is equivalent, or nearly equivalent to the institution of a suit; and that, whenever a suit is instituted, the time for the purpose of equitable relief ought not to count, for many purposes at least, against the plaintiff, after the time when notice of the objection was given; and it is said that notice of objection to this scheme or undertaking was given as early as the autumn of last year, and has been repeated and continued since. I do not, however, accede to the generality of the proposition. The question must depend very much on the circumstances of each particular case; and instances may well be conceived, in which, after notice of an objection or opposition, the delay to institute a suit founded on that may well count against the plaintiff. It strikes me that the present is one of those cases, more especially as in the spring of this year a bill was filed for the purpose of preventing what was intended. It was filed on the 17th of April, 1852; a motion was made for an injunction accordingly; the motion was opposed, and was refused with costs on the 24th of May. There was no appeal from the order on that motion, and the suit has since been abandoned. The same matter is taken up afresh by the present suit. My opinion is, that, upon the question of private right, without entering into any other considerations to which this part of the case may possibly be open, that delay furnishes sufficient ground for refusing the merely interlocutory application before us. What it may be right to do at the hearing is a different point.

The question of public right remains; and though a

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stronger case of delay is probably required to affect those who assert a public right than where a private right is alone in dispute, yet I cannot agree that delay even in such a case is to be without effect. I think it a circumstance to be attended to. Now, as far as the public right is concerned, there has been no suit whatever, except the present, which was instituted more than half a year after the intention to do these acts had become notorious.

And with regard to the public question, there is another consideration not to be forgotten.—I admit that motives are very often immaterial with reference to the manner of disposing of a suit. It has been said by an eminent Judge, that, if you were to look into the motives of suitors, Courts of Justice would not sit above a month in the year, and would have little to do. Of course there are, in numerous instances, motives for litigation, which, if they could be looked into, would prevent a Court of Justice from interfering—But, generally, I admit that it is not the rule so to regard them. Where, however, the public interest purports to be asserted, it is not wholly immaterial, at least upon an interlocutory application, to look into the motives from which, or under which, the matter is brought forward. Now, in the present case, though the Attorney-General's name is used, it is impossible not to see that the suit has been instituted more from regard to private than to public good. If the public interest clearly required the immediate interposition of the Court, that might not be material. But we find, as a fact, that the majority of the Town Council is in favour of what the defendants are proposing to do; and on a question of discretion, it is impossible, with reference to a community of this description, not to look with some degree of attention at what the governing body of the borough think on the subject. It is said that many of the members of the Town Council are interested in favour of the plaintiffs' undertaking. I dare say that is so; still they are members of the governing body, and the opinion of the majority is

I have stated. It is plain, moreover, on the evidence, that the opinions and the wishes of a great preponderance of the number of the inhabitants of this town are also in favour of what the defendants are doing. That does not legalise what is illegal; but it is a matter surely not to be disregarded, on an interlocutory motion, where the Court is to exercise a discretion, as, in my opinion, it is here bound to do. The case might be different if it were certain or highly probable that what is proposed would be a public nuisance of a dangerous or oppressive description. My opinion is, that the evidence before us does not shew that it is likely to be so, though I agree that what is intended will probably or certainly be in law a nuisance.

For the reasons that I have mentioned, without entering into others which might perhaps be suggested, I am of opinion that the present motion ought to be refused, without prejudice to any question, reserving the costs, and giving the plaintiffs leave, and, if necessary, the Attorney-General leave, to proceed at law by indictment or action, as they may be advised. I repeat that what is now done is not to be considered as binding the Court to any particular course at the hearing of this cause, when possibly an injunction may be granted.

LORD CRANWORTH, L. J.—I have come to the same conclusion, and so entirely upon the same grounds, that perhaps it is hardly necessary for me to say anything. My learned Brother has pointed out that the case divides itself into two branches. And in form, no doubt, it does. In substance, however, I cannot but come to the conclusion, that the Attorney-General and the public here are mere fiction, and that the real parties concerned are only those that were parties to the first suit.

Looking at it as a question merely between the plaintiffs and the defendants, I think there is abundant reason why there should not be an interlocutory injunction. I

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agree that there is no necessity for the intervention of a jury to teach us that digging up a public highway is a public offence or a public nuisance; but I am very far from seeing my way to the conclusion, that there is likely to be any private injury to these plaintiffs in the sense of there being an illegal act, an act of which the plaintiffs would have any right to complain. If what the defendants are proposing to do is not open to the objection of being a public offence, I am not prepared to say that it certainly must be such an injury to the plaintiffs as to give them a right of action against the defendants. It may be difficult to lay down parallel lines of pipes without some injury being done to those of the plaintiffs; but I think that there is not such a case made out as to render it discreet for this Court to interfere interlocutorily by an injunction, before the fact has been established in one way or the other by a trial. That seems to me to dispose of the question so far as the plaintiffs are concerned.

But then the plaintiffs fall back on what is the alleged injury to the public. Now, I have already said, that, in my opinion, this was an afterthought, and constituted no part of the original grounds of this litigation. I observe that the relator is in truth the same as the plaintiffs. The grievance complained of is, that in the progress of their works the defendants must do that which would constitute in point of law a nuisance. I dissent from Mr. *Rolt's* proposition in point of law, that, if it be once established that there is a public nuisance, there must be an injunction to restrain it. To what extent will that go? Every day there are nuisances in the streets of London; but it cannot be said, that, in every case where an indictment would lie, there must be a title to a injunction. I have no doubt that what the present Lord Chancellor said, qualified in the mode in which he meant it, is perfectly right. Once establish that the setting up something permanently is a nuisance, and it is immaterial whether it is more or less

And it was upon that principle that I proceeded in the case that was referred to of the *Rochdale Canal v. King* (a). Here, if I remember rightly, the plaintiffs were the owners of a very valuable canal. Adjoining owners of property to which the water was necessary paid them a sort of rent (I think they called it a water rent), for taking off a certain quantity of water from time to time. The defendants contended that they had a right to take it without any such licence; they, accordingly, did abstract it, and drove the plaintiffs to bring an action against them. The plaintiffs did so, and established their right—recovering, it is true, only a shilling, because the real question was to try whether there was a right or not. After that, the defendants defied the plaintiffs, and said “You will never recover more than a shilling.” I held, that, although drawing off a hundred gallons of water was a small thing, for which a plaintiff would not recover more than very trifling damages, yet the defendants were trying to baffle justice in a way at this Court would not tolerate. That is the principle which I understand the Lord Chancellor proceeded in the case of the brick manufactory (b). What the Lord Chancellor meant to say was this:—The Court will not let a person set up a nuisance and say it shall remain because it is a very small one. If it is a nuisance, and is likely to continue, the Lord Chancellor said that shall not be allowed. But how does that case apply here? It is true, that it may be said to be a violation of the law to dig up or interfere with the road wherever her Majesty’s subjects have a right of way; but what is urged on the other hand is, that this interference is infinitesimally small, and is much more than compensated in point of convenience to those who will be injured by it by the results which are to follow. Whether that view of the case is correct, it is not

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(a) 2 Sim. N. S. 78.

(b) *Walter v. Selfe*, 19 L. T. 308.

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necessary to speculate upon; but it is a satisfactory guide to the discretion of the Court to say, that probably the convenience resulting from it will preponderate over the inconvenience.

I think this is not a case in which this Court is bound to interfere, because there may be what amounts in point of law to a nuisance; and I concur therefore entirely in the judgment that has been given by Sir *George Turner*, qualified in the way that my learned Brother has pointed out,—that this motion should be refused, reserving the costs, and with liberty to the parties to bring such action or indictment as they may be advised in order to try their rights.

In October, 1852, the defendants actually commenced excavating the roads and streets for the purpose of laying down their pipes, when the plaintiffs again applied, on the ground of danger to the public, for an injunction before the Lords Justices(a). By consent, the cause was brought on for hearing on affidavits at the same time with the motion. After hearing the argument, their Lordships not concurring in opinion, the cause was ordered, by permission of the Lord Chancellor, to be set down for hearing before the full Court, to be argued by one counsel only on each side.

Mr. *Rolt* (with whom were Mr. *Amphlett* and Mr. *Overend*), for the plaintiffs, contended, that the Attorney-General, on behalf of the public, was fully justified in applying to the Court for an injunction to restrain a Company, not having the necessary powers accorded to them by Act of Parliament, from interfering with public thoroughfares and highways; that the fact of the greater number of shareholders of the new Company being re-

(a) Sir *J. L. Knight Bruce* and Sir *George J. Turner*, Lords Justices.

ident in Sheffield did not affect the general public; that no necessity had been shewn for establishing a new Company, the old Company being sufficient to satisfy the requirements of the public; that any Company, in addition to the existing one, must create an unnecessary impediment in the streets and highways, not only at the time of first laying down the pipes, but on every occasion when it should become necessary to repair them; that the liability to noxious effluvia from the gas must necessarily be increased by the additional pipes which any new Company might lay down; that the Company had not any power, under the Registration Act, to interfere with any public highway; and that the surveyors of highways, whose duty it was to preserve the roads, could not confer on any Company the power of disturbing them; that a great public necessity might weigh with the Court in withholding an injunction, but that no such necessity existed in the present case; that a public differed materially from a private nuisance, and the principles applicable to the former did not apply to the latter case; that, although the Courts often refused to interfere in a case of trespass on private rights, no decision could be shewn in which they had refused to interfere where parties without any sanction of law interfered with public rights.

Mr. *Daniel* (with whom were Mr. *T. H. Terrell* and Mr. *Logie*), for the defendants, contended, that they were empowered, by the complete registration of the Company and the consent of the surveyors of highways, to carry into effect the object of the Company by laying down the pipes; that, if the legal right were wanting, or if the new Company were acting even contrary to law, some appreciable injury must be shewn, to induce the Court to exercise its extraordinary jurisdiction by granting an injunction; and, in every case, the Court would weigh the advantage which the public would derive from the destruc-

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tion of a monopoly, and from a more certain supply of an article most conducive to the comfort and convenience of the inhabitants of a town, against the injury which was likely to be inflicted; that the inconvenience to be apprehended by the public was only of a temporary nature; and that, if it should become of any serious importance, the public might, by the Attorney-General, apply at any time to the Court for a remedy.

Mr. *Rolt* replied.

The following cases were cited:—*Haines v. Taylor* (a), *The King v. Tindall* (b), *Att.-Gen. v. Forbes* (c), *Att.-Gen. v. Nichol* (d), *Att.-Gen. v. Cleaver* (e), *Wynstanley v. Lee* (f), *The Rochdale Canal Company v. King* (g), *Att.-Gen. v. The London and South Western Railway Company* (h).

Sir G. J. TURNER, L. J.—The first question that seems to be of importance in this case is the general principle on which this Court interferes in cases of this description; and I take that principle to be the inadequacy of the remedy which the common law gives in cases of nuisance. That was distinctly laid down by Lord *Eldon* in *The Attorney-General v. Nichol* (d). Lord *Eldon* there says, “The foundation of this jurisdiction, interfering by injunction, is that head of mischief alluded to by Lord *Hardwicke* (i),—that sort of material injury to the comfort of the existence of those who dwell in the neighbouring house, requiring the application of a power to prevent as well as remedy, an evil, for which damages more or less would be given in an action at law The question is, whether the effect

(a) 10 Beav. 75.

(b) 6 Ad. & E. 143.

(c) 2 My. & Cr. 123.

(d) 16 Ves. 338.

(e) 18 Ves. 210.

(f) 2 Swanst. 333.

(g) 2 Sim. N. S. 78.

(h) Ante, p. 624.

(i) *The Fisherman's Company v. The East India Company*, 1 Dick. 163, 164.

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[of the building complained of] is such an obstruction as the party has no right to erect, and cannot erect, without those mischievous consequences, which, upon equitable principles, should be not only compensated by damages, but prevented by injunction." It is clear, therefore, that Lord *Eldon's* opinion in that case refers the jurisdiction of the Court to the extent of the injury, and to the preventive power of this Court as superior to any remedy which can be obtained at law for an injury which may be inflicted.

Now, it was said that that doctrine might be applicable to the case of a private nuisance, but not to one of a public character. That argument is enforced thus: it is said, if the injury or the inconvenience be trifling, it will not be a nuisance at law, and therefore the interference of this Court must take place whenever there is that which amounts to a nuisance at law, because the very fact of its being a nuisance at law imports that the injury and the inconvenience consequent upon it are great. But, looking at the principles on which this Court interferes, there cannot be any sound distinction between the case of a private and the case of a public nuisance. It is not on the ground of any criminal offence committed, or for the purpose of giving a better remedy in such cases, that this Court is or can be called on to interfere; but it is on the ground of injury to property that the jurisdiction of this Court rests. And, if it do rest on that ground, the only distinction which seems to me to exist between a public and a private nuisance is, that in the case of the one it is an injury to individual property, and in the other, to the property of the public at large.

The same principle, therefore, must guide the interference of the Court in both cases; and the question on which that principle rests is—whether the extent of the damage and of the injury be such as that the law will not afford an adequate and sufficient remedy. The same principle,

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which governs the Court in other cases in which its jurisdiction is more generally applied, seems to me to apply to cases like the present.

In the case of specific performance of covenants, the jurisdiction of this Court being founded on the inadequacy of the remedy at law. This Court will only compel the performance of those which are essential and cannot be adequately compensated by damages. It is the same in cases of trespass; it is not every trespass which this Court will enjoin, but such trespasses as are, or are assumed to be, irremediable, or, at all events, material, and so I take it to be in the cases of nuisance. The question, therefore, is, whether this is a case in which the remedy at law is so inadequate that the Court ought to interfere, having regard to the legal remedy, the rights, and interests of the parties, and the consequences of such interference.

Now, this case is one of a mixed character, partly of public and partly of private injury, and in considering it I think it important to separate the two questions of public and private injury. The injury to the public which is complained of arises from their interest in the streets of Sheffield; and it is said that these streets will be materially impeded by the laying down of the pipes of this Company, and by the continual taking up of those pipes, which will be necessary for the purpose of repairing them when they have once been laid down. As to laying down the pipes, that is a case of mere temporary inconvenience; for, when the pipes are laid down, the work which has been done is entirely completed—it is done once for all; and, if this Court is to interfere on the ground that it will be an inconvenience arising from the laying down of these pipes, which will occasion a temporary obstruction for two or three days, I am at a loss to see how the interference of this Court could be withheld in the case (which has been put in the course of the argument) of hoards erected in the public

streets where houses are under repair, or in the case of making cellars under the public streets, or in the case of the pavements of the public streets being obstructed by depositing goods on them. All these are nuisances in a greater or less degree; and, if the Court is to interfere on the ground that the pavement of the streets of Sheffield will be taken up for two days for the purpose of laying down the pipes of this Company, it seems to me, it will be equally bound to interfere in the cases to which I have referred.

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With reference to what has been said as to the continual taking up of the pavement which would be consequent on these pipes being laid down, it is true that there may be, and probably will be, some inconvenience resulting from that, but it is an inconvenience which will not affect the general body of the inhabitants of Sheffield; it is an inconvenience which may occur from time to time, but, possibly, in a much less degree than is anticipated by the parties. It appears to me that the inconvenience will be temporary, applying only to a particular part of the town, and not affecting the general body of the inhabitants to any extent which will render it inconvenient to all. Nor is it to be left out of consideration, in determining this question, that to some extent the law has provided a remedy in respect of these inconveniences. There is some remedy under the Highway Acts, and there are boards of surveyors, having control over the streets, who concur in these measures being taken; and as to any injury which any private individual may sustain, the law is open to him by an action on the case.

With reference to the second head of the argument, as to a private nuisance, it was said, that there would be a great injury to individuals by reason of the defendants, on laying down their pipes, acquiring an easement in that property which belongs to individuals. But this seems to me to be a private injury to each individual, and not a

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nuisance to all the inhabitants; and, if treated as a private injury to each individual, I think it is not a case in which this Court will interfere; it is an injury of which some will probably approve and others disapprove. It is evident, from the affidavits in the present case, that there are many of the parties inhabitants of Sheffield, who would be, and are, no doubt, willing and desirous that these pipes should be laid down before their houses, although others might be desirous that it should not be done. It cannot, therefore, be brought forward as a case of common injury to all, and as a case of private injury to each it does not seem to me to be open on the present record.

Something has been said of the public peace being endangered if this Court does not interfere; but I think that this Court cannot suppose that there is an inadequacy of the civil power to preserve the public peace. If the plaintiffs leave the defendants alone, the probability is, that there will be no disturbance at all; but they say they are justified in disturbing them, for that is the only means by which they can prevent these alleged acts from being done; but I think they cannot come to this Court and say, that the inadequacy of the law gives them a right to do the acts which occasion a breach of the peace, for it would apply to any case of an illegal act—to any nuisance or trespass, however trivial; for each and every one of these nuisances and trespasses might, in the result, lead to a breach of the public peace.

On the question of delay, as far as the plaintiffs are concerned individually, I cannot impute to them any delay; but, with reference to the proceedings by the Attorney-General, I do not concur in the statements of the plaintiffs that there has been no delay, nor in their argument that delay can have no influence on such a question as the present. The case as to the Attorney-General stands thus:—The works of the Company were begun in October, 1851, and it was not until July, 1852, that the

Attorney-General takes any steps. In the mean time the company have been allowed to enter into contracts, and make proceedings without any interference on the part of the Attorney-General. That delay will affect the Attorney-General as much as a private individual I am not prepared to say, but it is a circumstance to be considered in determining the question whether this Court shall interfere, although the application to it be by the Attorney-General; and I ground myself in that opinion on what fell from Lord *Eldon* in the case of *The Att.-Gen. v. Johnson*(a). He distinctly states his opinion, that time is an element to be considered in determining a question of injunction, though the application be by the Attorney-General on behalf of the public. I think, therefore, the case fails, so far as the public is concerned.

The question then rests on the private rights of the plaintiffs. What is the injury to the plaintiffs in their character of a joint-stock company, a company incorporated by Act of Parliament, beyond that which the public sustain? It is said, that there is damage to their pipes; but, if there be any, there is a remedy for them in an action on the case; I think, however, that there is great weight in the argument which has been used on the part of the defendants, that these plaintiffs, having acquired a right to lay their pipes, are in truth seeking, through the medium of that right, a higher and better right—a right to preclude others from laying down their pipes also. I do not think that there is any case of damage established which is sufficient to justify the interference of this Court on the ground of private nuisance; and I have been throughout this case very much struck with the great strength of the affidavits which were made on the first application, as to the anticipated nuisances, the enormous inconveniences which were then anticipated as likely to

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(a) 2 Wils. Cha. Ca. 87.

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result to the plaintiffs from the defendants being permitted to lay down their pipes at all, and what, in my opinion, is the very different aspect of the case on the affidavits as they now stand, shewing that those injuries which were anticipated in April, 1852, and which were so strongly deposed to on that occasion, have not been inflicted. This conclusion I have come to from the affidavits which have been filed on the present occasion; and it is in evidence that six miles, and it is said eight more miles, of the pipes of the defendants have been laid—fourteen altogether—during the pendency of the present matter.

Another view which strikes me, with reference to the interference of this Court in cases of this description, is this—the parties have here come into equity on purely legal grounds, and in a case where there may be some possible doubt of the result of the proceedings at law; and I take it, that, in a case of that description, the ordinary course of this Court would be to allow the proceedings at law to go on, in order that the Court may see the result of those proceedings. It is upon an equity founded on a legal right that the plaintiffs come and ask an extension of the legal remedy. It is first to be seen to what extent there is the alleged mischief, before this Court will interfere. The effect of its interference might be to prevent, in truth, the legal question being tried at all. Upon these grounds, therefore, and being satisfied that there is not that extent of mischief which, in my opinion, would justify the interference of this Court, the conclusion that I have arrived at is, that this information and bill ought to be dismissed. If it shall eventually appear that any such excessive mischief shall arise as is contemplated on the part of the plaintiffs, it will be quite open to them, notwithstanding the dismissal of the bill, to file a new information or bill, and to make a new case upon new facts; but upon the facts as they at present stand, my opinion is that

this information and bill ought to be dismissed, but without costs.

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Sir J. L. KNIGHT BRUCE, L. J.—In making the order of the 6th of August last the Lords Justices intended it to be without prejudice to any question, and particularly meant that it should not hamper or interfere with the judicial discretion of the Court as to how it should deal with the case at the hearing. This I believe to have been well understood on both sides. My impression is, that the order so made on an interlocutory application, and in the state of facts and circumstances then presented to the Court, was not an incorrect or erroneous order. I might have expressed myself more fully and correctly, and probably my judgment was susceptible as well of addition as of amendment; however that may be, neither the order of the Vice-Chancellor nor of the Lords Justices ought to influence the Court in granting or refusing the injunction now asked. Not only is the motion before it now a new motion, but we are at the hearing of the cause upon more evidence and upon new facts. One ground against the relief sought by the information is that of acquiescence or laches on the part of the plaintiffs. I think that no such point is established. Early and speedily after the announcement of the defendants' project the plaintiffs protested against it openly and publicly, and they have uniformly declared and asserted practically their opposition to it. Whether this suit was instituted soon enough to entitle the informant and plaintiffs to an interlocutory order for an injunction may be doubted; but it was commenced, I think, soon enough to warrant them in asking the Court for a decree, on making a case for one in other respects. The expenditure, on the part of the defendants, has taken place under a full notice that it was objected to, and that endea-

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vours were and would be in active operation to render it useless, on the grounds, or alleged grounds, taken by the information and bill.

Then comes the question, whether the acts done and intended by the defendants, of which the informants and plaintiffs complain, amount, or, if performed, will amount, to a nuisance in point of law. Upon the evidence now before the Court, I think that this question must be answered in the affirmative if propounded for the purpose and in the sense of the information or bill separately, and therefore in the affirmative if propounded for the purpose and in the sense of both together. Various public highways in the town of Sheffield have, since July last, in the prosecution of designs previously announced, been unlawfully broken up for the purpose of laying down the defendants' pipes. The same course of proceeding is intended to be, with equal unlawfulness, pursued by them in other public highways of the town, to an extent still greater; and it must be taken as substantially certain, that hereafter, in case of the absence of judicial interference to prevent it, the highways under which the plaintiffs' pipes are lawfully, and the defendants' pipes unlawfully have been or shall be, laid, will in various places be, without just right or lawful power, broken up by the defendants for the purpose of repairing their pipes, whether in consequence of casualties which may happen to them or otherwise, and for the purpose of making communications between their main pipes and dwelling-houses or other buildings. These illegal proceedings, effected and intended, present and future, may perhaps well be said, in one sense, to be of a temporary and transitory, and not of a perpetual or permanent kind. But, from the nature of the case, there is obviously, I think, another and probably more important sense in which a character of perpetuity and permanence may probably be ascribed to them. It has been argued, that the annoyance, if any, now felt, and possibly hereafter to be

elt, may be small, slight, and unfit for this Court's interference; but the frequent occurrence—for ever, or during a period probably long and unascertained—of an annoyance which may be slight in itself—slight, I mean, if occurring upon a single day, or only at rare intervals—may much interfere with the reasonable convenience and comforts of life. Upon the evidence now before us, it is, I think, reasonable to believe that during a period—probably long and unascertained—the defendants' proceedings under consideration, unless judicially prevented, will be of frequent as well as of unlawful recurrence, and will unlawfully create from time to time inconvenience to persons who, as travellers or passengers, may have occasion to use the public streets and highways in Sheffield, or to the shopkeepers and other inhabitants of the town, and to the plaintiffs. Nor, if we now refuse an injunction, can it reasonably, I think, be denied, that, in respect of these unlawful proceedings, actual or intended redress, remedy, or punishment may from time to time for many years to come be sought at law criminally and civilly, as well summarily as otherwise, to a very inconvenient and burdensome extent of diversified litigation at the instance of a variety of persons. This multiplication of suits and prosecutions must not be lost sight of.

It was assumed, not unreasonably, before the Lords Justices, in January of this year, and argued upon the possibility, that the defendants, in the course, and by the aid of time, might, through submission or acquiescence—this Court not interfering—acquire in the soil, or in the use of the soil, or streets and highways, where their pipes are proposed to be and are now laid down, a right not now existing, which, if acquired, might be found considerably inconvenient, publicly as well as privately. I do not think that this argument has been displaced or answered. I am aware that this bill is filed by the plaintiffs on their own behalf merely; but it cannot be denied, that,

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by way of easement or otherwise, they have in the soil or streets and highways within the town, under their Act, an interest exceeding and differing from that of persons who have merely the right to use them when walking, riding, or driving, or to have them preserved as approaches to their shops, warehouses, and dwelling-houses in an uninterrupted and unobstructed state.

It seems to me right to notice the incorporation, whether completely or incompletely, of the defendants, and the nature of the association thus formed. They have the advantage and strength of lastingness, union, and number; and it may well be thought—nor is it new to hold and act upon the opinion—that infringements, even slight infringements, of rights in respect of land, by persons or bodies so circumstanced, require especially to be watched with a careful eye, and repressed with a strict hand by a Court of equity, where it can exercise jurisdiction.

The propriety of a bill may probably well be thought open to more doubt than the propriety of an information in the present case; but I consider both to be well founded—the information, upon the ground of the public and general nature of the nuisance; and the bill, if on no other ground, yet on account of the interest, in the nature of a private interest, (whether by way of easement or otherwise), in the soil of the public highways in Sheffield, which I have referred to, namely, that which the plaintiffs, as a Company, have under their Act of Parliament—an interest likely, I think, as I have said, to be prejudiced by the defendants' illegal proceedings. I cannot look upon this in the sense or way of interference with a monopoly; the plaintiffs cannot be truly said to have any right in the nature of a monopoly; but they are entitled to have their pipes protected, and to exercise fairly the powers conferred upon them by the legislature, which has, for the general good, placed them under obligations and liabilities from which the defendants are exempt.

It has been urged, and perhaps not without foundation, that the majority, or at least a very considerable portion, of those who compose the governing body, and of the inhabitants generally of Sheffield, are opposed to this suit, and wish well to the defendants and their operations; and it is also plausibly contended, that it will be, on the whole, to the convenience and advantage, rather than to the inconvenience and disadvantage, of the town. A fact, too, (I suppose it to be true), was urged, that there are many parts of England where Companies (constituted for such purposes as the defendants') exist, whose works, without any authority from the Legislature, and without litigation or any objection, have long been and are still interfering with the streets and public highways in the manner complained of in the case before us, and which, in my opinion, ought to be prevented.

Each one of these considerations probably deserves some attention; but they are not, I conceive, conclusively in the defendants' favour, and are, in my opinion, outweighed by others. If this suit is opposed to the views and wishes of the majority of the governing bodies and general inhabitants of Sheffield, the minority do not, therefore, lose their right. Their views of what is for the convenience and advantage of the town are not necessarily to be disregarded in a case where they have law on their side; but if the relator and plaintiffs have a right, independently of what has been and what is going on in other towns and places, they are not to be deprived of it because this town and other places may, through the success of this suit, be disturbed or inconvenienced.

The Legislature is open to all, and therefore to the defendants, who, if they desire parliamentary authority for their undertaking, and make a case for it, will, I dare say, obtain it. The probably great expense of an opposition before Committees of the two Houses of Parliament

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has been fairly enough made the subject of remark; that ought not, however, to influence our judgment.

It has been said, that there are parish surveyors or local boards, to whom or to which the defendants are willing to submit; and certain agreements upon that subject, perhaps of a lawful, perhaps of an unlawful, nature, have been produced; but, neither have boards of commissioners nor surveyors powers of such extent or force, or practical utility, for the purposes now under consideration, as those which the Court of Chancery can by injunction exercise; nor, if they had, would it be right for the Court to give up so important and useful a branch of its own undoubted jurisdiction. The Attorney-General or the plaintiffs cannot be required to trust or to resort to the active discretion or judgment of any surveyors or boards, present or future, changing or unchanging, partial or impartial, wise or unwise, for the prevention or protection which it is the object of this suit to attain. There are legal proceedings pending, with which the relator or plaintiffs, upon having an injunction, ought, I think, to undertake to deal, so far as they can, in any manner that the Court, on any application or suggestion from the defendants, now or hereafter may deem reasonable; but the pendency of those proceedings ought not, in my judgment, to delay or impede the action of this Court in a case where the law and facts appear to me to be free from obscurity, especially since the passing of an important statute, which, though at present in operation, was not so in August last.

Not forgetting the expressions attributed, and probably with correctness, to Lord *Eldon*, in the case of *The Att.-Gen. v. Cleaver* (a), and also not forgetting those to be found in the case of *Crowder v. Tinckler* (b), I am of opinion that the relator and plaintiffs are entitled now to an injunction (until further order) substantially, though not ex-

(a) 18 Ves. 210.

(b) 19 Ves. 617.

actly, in the terms in which they pray it, upon the undertaking I have just mentioned being given by the relator and the plaintiffs, with liberty to either party to apply again—a liberty which may be especially useful in the event of a certain result of the trial of the pending indictment. As to the costs of the suit, I have entertained, and still entertain, too much doubt to enable me to concur in any order as to the costs of the relator, the plaintiffs, or the defendants.

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THE LORD CHANCELLOR.—It was on the proposition of the Lords Justices that I consented to hear this case. There was a difference of opinion between those learned Judges, and it was thought better that I should come in as a sort of umpire, and decide upon which side I considered the justice of the case to be. I confess I have come to a clear opinion against the plaintiffs. It appears to me, and in this point both the Lords Justices concur, that it is a question of degree whether the Court will interfere or not. If that be the right view of the case, then the question is, whether or not such a probability of substantial injury to the rights of the public passing along the streets of Sheffield, or to the inhabitants using those streets, has been made out as to make it a reasonable exercise of jurisdiction for this Court to interfere to restrain them.

Now, I confess, my opinion is, that no such case has been made out. Although, in the course of the argument here, a doubt did pass through my mind, whether the Lords Justices rightly decided in August last; yet I have come to the conclusion, not only that that doubt was not well-founded, but to a still stronger conclusion, upon the hearing, that there is no case to warrant our acting now otherwise than as we acted then. Is the evil of such a nature as to justify the Court in now interfering? What is the evil? It is said, the defendants are about to tear up the streets to an extent, which one side

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represents as seventy, the other as one hundred, miles. It may be, that, before they complete their works, they will have taken up the paving over seventy miles, but they will never have up above twenty yards at the same time, and they will never have that up, they say, for above two days; and, I should think, as they are getting on with the work, not above three or four hours. That is my experience from what one observes when similar works are going on in the metropolis—they are no sooner begun than ended; and, it seems to me, that the circumstance of the work being done at an infinite variety of places in the course of the next or of two or three years, during which time the process of laying down the pipes will be going on, does not vary the case. One must look at the quantum of evil at each particular place and each particular moment of time, to see if this injunction ought to be sustained on the ground that there is a continuity, in the sense of going from one place to another, to extend over one or the next two years.

I do not see that that is a ground for interfering. To put a case by way of illustration—street music might amount to a nuisance if continued before one house during the whole day, but would not be so regarded if it was only passing from one street to another.

I do not rest this case merely on the ground of its being an injury in a very small degree; but I think it may be safely deduced from the Acts of the Legislature that it is considered such an injury as it did not think necessary to provide against. I come to this conclusion from the different statutory provisions to which our attention has been drawn. The Joint-stock Companies Registration Act(a)—although that Act does not authorise Gas Companies, by name, to be formed as joint-stock companies for the manufacture of gas—contains a provision giving a

(a) 7 & 8 Vict. c. 110.

gory of certain associated companies which cannot
y their works into operation without the aid of
liament, in which gas companies are not included.
en the argument was pressed, I suggested, that per-
s the Legislature might contemplate a company for
ring gas behind a row of houses, and supplying
n with gas through their own land with their con-
t. That was a suggestion which passed through my
id, but I cannot seriously believe it was any arrange-
nt of that sort that the Legislature looked to; it must
e looked at the facts, that companies might be formed
the manufacturing and supplying of gas to a town,
might carry their association into effect without the
of an Act of Parliament; which must mean, that they
ught it possible that they might in some way or other
ply the inhabitants of a particular district or town
h gas, without the authority of the Legislature.

but it was said, gas companies could not do so without
t authority: that they could not come and violate the
by tearing up the pavement. I have two solutions in
mind on that subject, either of which, I think, is
sfactory. Perhaps the Legislature thought they
uld only do this with the sanction of the surveyors or
per authorities, which would prevent their doing any-
g which they considered injurious to the public, who
uld pass along and use the roads or streets through
ch the pipes would be laid, and that it might be safely
usted to them; or it may be, that the Legislature did
consider the act of taking up the pavement for such
gitimate purpose as this, a nuisance at all. That may
bably be the question to be decided on the trial of the
ictment(a).

b) On the trial of the indict-
t, a verdict was given for
Crown, with leave for the
ndants to move to enter a
lict of not guilty. A rule was

accordingly obtained, but was
discharged June 4th, 1853, the
Court of Queen's Bench holding,
that the obstruction amounted
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If I had thought that the question of injunction or no injunction depended on the decision of the legal right, I should have been very ready to ask the Lords Justices to concur with me in letting this cause stand over until after the trial of that indictment; but I do not think so. If the acts of the defendants are unlawful, I think they are so in too small a degree to warrant this Court's interference by injunction. When the cause was argued before the Lords Justices in August last, I said we did not want any Court of law to tell us that tearing up the pavement was a nuisance; but, I did not then advert to the particular circumstance or act contemplated by these defendants, but merely to the general proposition; and I cannot say that it appears to me absolutely impossible to be held that the taking up the pavement for such a purpose as this is a nuisance. I do not say how the matter may be, but it may be held to be analogous to this: if I were to station a cart in the street opposite to my door, obstructing the public highway, I might be guilty of a nuisance for aught I know, and I might be liable to be indicted; but it would be a sufficient answer to say, that the cart was there only a reasonable time, and for a lawful purpose. If it is used in the way in which such things are ordinarily used, it cannot be a nuisance so to use it. The public highway is for the convenience of mankind, and so to use it cannot be a nuisance.

All these cases of nuisance or no nuisance, arising from particular acts, must, from the nature of things, be governed by particular circumstances. If a carriage were to drive up in Belgrave-square, and stand half the day at the door of a house, waiting for some person calling there, I do not think that that could be made out to be a nuisance. But, suppose the same thing to happen in a street of the width of one carriage only, I do not know that that would not be a nuisance. You must be guided by the particular circumstances; you must look at the particular

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place or object. I take it, that all these questions are of this nature—are you using the subject-matter of inquiry in a reasonable way, and are those the uses for which it was contemplated? It may be, that tearing up the pavement, even for the purpose of laying down gas pipes, was not even in the contemplation of, and cannot be done without the authority of the Legislature, or some other competent authority. But, as I said before, if I thought that the question turned on the decision of that point, I should probably have wished the matter to stand over till after the trial of the indictment. Not thinking so, but thinking that the evil, if any, which does exist, is of such a very transient nature, that at no one spot, or to no one individual, can it be said to be more than a passing and almost imaginary evil, I am of opinion that no case is made out for restraining these parties. I concur, therefore, with Lord Justice *Turner*, in thinking that this bill and information ought to be dismissed; though I entirely concur with both the Lords Justices, that nothing should be said as to costs.

Mr. *Rolt* then asked whether the plaintiffs might be at liberty to file a new bill.

THE LORD CHANCELLOR.—In the case of the *Chorley Waterworks* (a), we held that the dismissal of a bill would not prevent a plaintiff from filing a new bill upon new facts. You may file a new bill on new facts.

(a) 2 De G., Mac., & G. 852.

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BEFORE THE MASTER OF THE ROLLS (a).

Jan. 14th;
Feb. 8th.BROWNE v. THE MONMOUTHSHIRE RAILWAY AND CANAL
COMPANY.

A Railway Company, by the terms of an Act of Parliament, were to complete a certain line of railway and certain improvements to an existing line within a specified time. The time elapsed without the works having been done. The Company were about to declare a dividend, when one of the shareholders filed a bill, on behalf of himself and other shareholders, against the managing directors and others, praying an injunction to restrain the payment of any dividend until the works specified in the Act of Parliament had been completed. A general demurrer to the bill

was allowed, but without costs:—*Held*, that the Court has not jurisdiction, in a bill so framed, to interfere, on the mere ground that the managing directors are not discharging their duty to the public.

That the Court will not interfere to prevent the misapplication of the income of the Company, it being a subject for internal management and regulation.

Semble, that it is not settled by decision, to what extent or subject to what particular limitations the jurisdiction of the Court, to prevent or check the erroneous conduct of corporations created for public purposes, ought to be exercised.

The Court discountenances merely formal and technical causes of demurrer assigned by public Companies.

(a) Lord Langdale.

aired to carry thereon; and until they had provided such carriages, locomotive steam-engines, and other moving power as aforesaid, for the accommodation and convenience of the public; and until all necessary facilities could be afforded by the Company, as well for conveying passengers, animals, and goods along their railways, as for taking passengers, animals, and goods to and from the same.

The facts, which were sufficiently stated in the outset of the judgment of the Master of the Rolls, were as follows:—

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BEFORE THE MASTER OF THE ROLLS (a).

Jan. 14th;
Feb. 8th.BROWNE v. THE MONMOUTHSHIRE RAILWAY AND CANAL
COMPANY.

A Railway Company, by the terms of an Act of Parliament, were to complete a certain line of railway and certain improvements to an existing line within a specified time. The time elapsed without the works having been done. The Company were about to declare a dividend, when one of the shareholders filed a bill, on behalf of himself and other shareholders, against the managing directors and others, praying an injunction to restrain the payment of any dividend until the works specified in the Act of Parliament had been completed. A general demurrer to the bill

THIS was a demurrer, for want of equity and for want of parties, to a bill filed in November, 1850, by James Browne, on behalf of himself and all other the shareholders of the Monmouthshire Railway and Canal Company, against the Company and certain persons who formed the committee of management of the Company; and it prayed that the defendants might be restrained from declaring or making any dividend to any of the shareholders of the Company at the ensuing meeting of the 20th of November, 1850, and from at any time declaring or making any dividend to any of the shareholders of the Company until they should have completed the railway and branches, by the Newport and Pontypool Railway Act, 1845, authorised to be made; and until they should have improved their then existing railways, and adapted them for the convenient passage of locomotive steam-engines for the carriage of goods and merchandise at reasonable rates of speed; and until they should have provided carriages and locomotive steam-engines and other moving power necessary for the carriage of passengers, animals, and goods which might be conveyed to their railway, and which they might be re-

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That the Court will not interfere to prevent the misapplication of the income of the Company, it being a subject for internal management and regulation.

Semble, that it is not settled by decision, to what extent or subject to what particular limitations the jurisdiction of the Court, to prevent or check the erroneous conduct of corporations created for public purposes, ought to be exercised.

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(a) Sect. 26.

(b) Sect. 100.

The Company were then authorised to demand such tolls as therein mentioned for the use of the railway (a); and it was enacted, that they should, and they were thereby required, within three years after the passing of the Act, to improve their existing railways wherever that might be necessary, to adapt them for the convenient passage of locomotive steam-engines for the carriage of goods and merchandise at reasonable rates of speed, and to provide and maintain such and so many carriages and locomotive steam-engines and other moving power, as might be necessary for the carriage of passengers, animals, and goods which might be conveyed to their railways, and which they might be required to carry thereon; and it was enacted, that the company should and they were required to carry, as common carriers for hire, on their existing railways, within three years of the passing of the Act, and also on the railway thereby authorised to be made, when and as soon as the same should be opened for traffic, by means of locomotive steam-engines and other moving power, in their own carriages, and in the carriages of other persons, all passengers, animals, and goods which might be brought to their railway, and which they might be required to convey thereon (b).

It appears, then, that by the provisions of this Act, at the end of three years from the passing of the Act, the compulsory power to purchase land was to cease, the railway was to be completed, and the Company were to carry, as common carriers for hire, upon their existing railways, passengers, animals, and goods. In the year 1848 an Act of Parliament was passed, whereby the name of the Company was changed (c); and it was enacted, that the Company, instead of being called "The Company of Proprietors of the Monmouthshire Canal Navigation," should be called "The Monmouthshire Railway and Canal Company;" and it was thereby enacted, that the powers of the Company for the

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(b) Sect. 110.

(c) 11 & 12 Vict. c. cxx.

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ing doubts as to the capability of the Company to perform their obligations. That any interference by the Court might work great injustice; for instance, if in one year it might be extremely difficult or impossible to raise the required capital by reason of the state of the money market, and the dividends of the whole line were applied to the completion of the works, the capital which might readily be raised in a subsequent year would not be applicable to the repayment of the dividends so applied, and the then shareholders would be clearly deprived of their rights. That the present case differed from that of *Carlisle v. The South Eastern Railway Company*(a), inasmuch as there was no direct prohibition as to the payment of dividends; but even in that case the Lord Chancellor refused to interfere to prevent the payment of a dividend already declared.

Mr. *Turner* and Mr. *James*, in support of the bill, contended, that the legislature gave extraordinary powers to this Company, on the conditions, and subject to the performance of the works, particularly mentioned in their Acts. That they could not absolve themselves from these conditions and obligations, or apply the funds which came to their hands in any other way than in fulfilment of them, so long as any remained unperformed. That the accomplishment of these works, which was equivalent to expenditure of a certain sum, was similar to a debt due from the Company; and that no division of profits could be made so long as they remained unsatisfied. That the word "debt" in the 51st section of the 8 & 9 Vict. c. clxix. meant estimate of probable expenses of executing works to be performed. That this case did not differ from a person accepting a benefit subject to a condition, who became by the acceptance for ever bound by the condition: *At*

(a) Ante, Vol. 6, p. 670.

Attorney-General v. Christ's Hospital(a). That the Company were as much bound to perform the conditions of their Act as a person taking a house under a repairing lease was bound to perform the covenants under which he had contracted. That the plaintiff could not, in a case of this sort, sue on behalf of the public, nor on behalf of all the shareholders. That he could not represent the shareholders who did not take the same views with himself, nor the holders of preferential shares.—They cited the cases of *Foss v. Harbottle*(b), *Lord v. The Copper Miners' Company*(c), *Mozley v. Alston*(d), *Bailey v. The Birkenhead, &c. Railway Company*(e). That the directors of a Company were bound to apply all the funds in their hands to the specific purposes of their Act: *Salomons v. Laing*(f). That this was so far a misapplication of the funds of the Company, that it could not be considered a matter of internal arrangement. That any shareholder could singly oppose the application. That it was a breach of trust on the part of the directors towards any one dissentient shareholder. That the shareholders were liable as a body for the consequences of the misapplication of the money, and to any proceedings which the Attorney-General on behalf of the public might institute against the Company: *Cohen v. Wilkinson*(g).

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Mr. Roundell Palmer, in reply, contended, that there was no real distinction between dividends and interest; that, under the 42 Geo. 3, c. cxv. s. 25, the directors were to declare a dividend half-yearly, if they thought it expedient to do so; and that, all the works contemplated by that Act having been completed, the shareholders were entitled to receive a share of the profits. That the new

(a) 1 Russ. & My. 626.

(b) 2 Hare, 461.

(c) 2 Ph. 740.

(d) Ante, Vol. 4, p. 636.

(e) Ante, Vol. 6, p. 256.

(f) Id. p. 289.

(g) Ante, Vol. 5, p. 741.

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Acts did not deprive the shareholders of their interest under the old Act. That the Legislature contemplated a sufficiency of funds to be raised by the powers under the new Acts, and did not justify a falling back upon the dividends of the principal subscribed for the purposes of former Acts. That the word "debts" in the 51st section 8 & 9 Vict. c. clxix. could not mean "violated obligations," but "money due." That, if all monies received from proceeds of the capital expended were applicable in the first place to the completion of the works, there was no reason why such an application should not prevent the payment of any interest on mortgage or other securities given by the Company for money advanced. That the bill was improperly framed; it could not be filed by a shareholder on behalf of the public. That it was not filed by one shareholder on behalf of other shareholders to compel the performance of an obligation, or to have funds applied to a specific purpose; but it sought an injunction to prevent the application of money to purposes not excluded or prohibited by the legislature. That there was no proposition to do an illegal act, as in *Cohen v. Wilkinson*, and *Salomons v. Laing*. That the obligations to the public were quite distinct from the obligations to shareholders. That the inconvenience to shareholders generally would be great if one dissentient shareholder should have the power at any time, by an application of this sort, to suspend the payment of a dividend, on which the subsistence of the shareholder might depend. That the preferential shareholders were not represented by the plaintiff, and ought to be before the Court.

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The MASTER OF THE ROLLS (after stating the facts of the case as hereinbefore set forth).—If the allegations contained in the bill be true—and upon this occasion they must be taken to be so—it is plain that the Company have not obeyed the Act of Parliament, and have not performed the

duty in consideration of which the powers which were conferred upon them were given; and they are plainly in default. The bill alleges, that the Company possess the necessary powers to complete their works, and that they assign no reason, except their want of funds, for not doing what is required; but they allege their want of funds, and their inability to raise money for the purpose, as the reasons for their neglect to comply with the exigencies of their Acts of Parliament in respect of the several matters complained of.

It is also alleged, that, in this state of things, they have received a considerable income from the employment of their canal and some parts of their roads; and that, instead of applying such income as part of their property in completing their works, according to their engagement, and in performance of their duty under their Acts of Parliament, they have (notwithstanding the liability under which their default has placed them) considered, and claim to be entitled to consider, as profit, so much of their income as they think proper; and that they have accordingly divided, and claim to be entitled to divide, the same as profit amongst the shareholders.

As to the past dividends, it is alleged, that, since 1845, they have gone on making dividends, not anticipating any difficulty in raising capital; but, the difficulty having occurred, they are nevertheless proceeding to declare a dividend; and it is alleged, that they have no funds, and no prospect of obtaining funds, available for the works and improvements which it is their duty to make, except the fund out of which they are about to declare a dividend; and that their obligation to make such works and improvements is an existing liability, which ought to be discharged before any profits are declared or divided. This bill is filed for an injunction to restrain them from doing so.

The defendants have demurred for want of equity, and

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the real question upon which the decision of the Court is required appears to me to be very properly raised on such a demurrer.

Certain formal and technical causes of demurrer are also stated. As the facts and circumstances of this case do not, in my opinion, require me to decide on those formal and technical objections, I may be allowed to observe, without any direct reference to this particular case, that although such demurrers are quite proper to be filed in cases where they are required, to secure due attention to all interests involved in the decision, yet that merely formal and technical causes of demurrer seem to me to be too commonly assigned in cases affecting railway companies and joint-stock companies, on the apparent ground, that, if they do no good, they are not likely to do much harm, and may possibly increase the expense and tend to the embarrassment of the plaintiffs in such cases, and create delay, which may be of some convenience to the defendants. It seems not to be sufficiently considered, that a character for fairness, and a willingness to meet objections, and facilitate the settlement of really disputed questions on fit occasions, would contribute much more to the honour and credit of the companies and their agents, than a character for skill and adroitness in baffling investigation by unnecessary litigation and delay.

For the purpose of considering the demurrer for want of equity, the material circumstances are, that the time appointed for the completion of the works has elapsed, and the works are not performed; that nothing impedes the completion of the works but want of money; that capital cannot at this time be raised, either by calls or by loans; that they have money arising from income which ought to be applied in satisfaction of their liabilities; and it is alleged, that the obligation to complete their works is a liability in the nature of a debt.

The argument for the defendants is, that their Acts do

require any such application of income, but clearly capital as the fund by means of which the works are executed, and that the capital is to be raised by means and by money borrowed on mortgage or bond; that the company, not having raised all their capital, and being in difficulty, which may be only temporary, in enforcing payment or in borrowing on mortgage or bond, have a discretion as to the application or appropriation of their income; that this discretion is not to be restricted or limited in any other way than by express enactment.

The plaintiff, on the other hand, alleges that the Companies, deriving their extraordinary powers from Parliament, are considered, and ought to be treated, as having been entrusted with the public to perform the works, and that they are not to be allowed to divide any profits without completing the works; and having undertaken the execution of the works within a certain time (which has expired) are, after the lapse of that time, justified in dividing any profits arising from their works, when incomplete and unfinished, whether so left undone altogether, or for a long time as may suit the convenience of the defendants, or until a favourable opportunity may arise of raising money for their completion, at a time when it may be advantageous to themselves to do so, by shares or by loan; that the expense of completing the works is an amount of a debt owing by the Company, and ought to be taken into account in making up their balance-sheet, it being unjustifiable to compute profit without deducting debts into account.

Having given my best attention to this case, and thinking it of very great importance and of some difficulty, I am, on the whole, of opinion that this bill cannot be sustained. The jurisdiction of this Court has, in several instances, been very usefully applied in preventing or checking the erroneous conduct of corporations created by Act of Parliament for public purposes; but it is not settled

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(a) Sect. 26.

(b) Sect. 100.

The Company were then authorised to demand such tolls as therein mentioned for the use of the railway (a); and it was enacted, that they should, and they were thereby required, within three years after the passing of the Act, to improve their existing railways wherever that might be necessary, to adapt them for the convenient passage of locomotive steam-engines for the carriage of goods and merchandise at reasonable rates of speed, and to provide and maintain such and so many carriages and locomotive steam-engines and other moving power, as might be necessary for the carriage of passengers, animals, and goods which might be conveyed to their railways, and which they might be required to carry thereon; and it was enacted, that the company should and they were required to carry, as common carriers for hire, on their existing railways, within three years of the passing of the Act, and also on the railway thereby authorised to be made, when and as soon as the same should be opened for traffic, by means of locomotive steam-engines and other moving power, in their own carriages, and in the carriages of other persons, all passengers, animals, and goods which might be brought to their railway, and which they might be required to convey thereon (b).

It appears, then, that by the provisions of this Act, at the end of three years from the passing of the Act, the compulsory power to purchase land was to cease, the railway was to be completed, and the Company were to carry, as common carriers for hire, upon their existing railways, passengers, animals, and goods. In the year 1848 an Act of Parliament was passed, whereby the name of the Company was changed (c); and it was enacted, that the Company, instead of being called "The Company of Proprietors of the Monmouthshire Canal Navigation," should be called "The Monmouthshire Railway and Canal Company;" and it was thereby enacted, that the powers of the Company for the

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(a) Sect. 104.

(b) Sect. 110.

(c) 11 & 12 Vict. c. cxx.

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compulsory purchase of lands might, as to certain scheduled lands, be exercised for the term of two years from the passing of that Act, that is, until the 14th of August, 1850; and that the term by the former Act limited for the improvement of the existing railways of the Company, when necessary to adapt them for the convenient passage of locomotive steam-engines at reasonable rates of speed, should be extended until the 1st of August, 1849; and that the term limited for the completion of the Newport and Pontypool Railway, and of the works by the recited Acts authorised and required, should be extended and enlarged for the term of two years from the passing of the Act; and that the powers granted by the Act for these purposes respectively might be exercised during such extended periods (a).

It was alleged by the bill, that, under this Act, which received the royal assent on the 14th of August, 1848, it was the duty of the Company, on or before the 14th of August, 1849, to have improved their existing railways wherever it might have been necessary to adapt them for the convenient passage of locomotive steam-engines at reasonable rates of speed; and they ought, on or before the 14th of August, 1850, to have completed the Newport and Pontypool Railway, and the works authorised and required by the former Act. It was also alleged, that the Company had neglected to complete the Newport and Pontypool Railway; that they had discontinued all their works for the construction thereof, and refused to take any steps for resuming their operations thereon; and that no part thereof was, at the expiration of the extended period of two years, or at the filing of the bill, completed or opened for the conveyance of passengers or goods; that a part of the railways of the Company existing at the time when the last Act passed, viz. the Blaenafon Railway, which it was necessary to improve, in

(a) Sect. 9.

order to adapt it for the convenient passage of locomotive steam-engines for the carriage of goods and merchandise at reasonable rates of speed, was not, at the expiration of the extended period, namely, on the 14th of August, 1849, and had not then, been improved and adapted, but still remained and was unfit for such convenient passage of locomotive steam-engines; that no carriages or locomotive steam-engines, or other motive power, had been provided, nor had any other measures been adopted by the Company for the carriage of passengers, animals, or goods thereon; that the Company never had discharged, and did not then discharge, the office of common carriers on the Blaenafon Railway.

The demurrers now came on to be argued.

Mr. Roundell Palmer and Mr. Campbell, in support of the demurrer, contended, that there was no logical coherence in an argument, that, because certain works to be done before a certain period had not been completed, therefore at no subsequent period the Company could be allowed to declare a dividend without first completing the works. That, although it was admitted that the time prescribed by the Act had elapsed, still the Company had taken land, and were in a condition to complete the works whenever the managing directors thought it expedient to do so: *Salmon v. Randall*(a). That, in a bill of this sort, the Court could not inquire into the means of the Company to perform its obligations. That, if it were once established that no incomplete undertaking could apply any part of its earnings in dividends, then half the railways in the kingdom would be unproductive to the shareholders. That old Companies were constantly applying for new powers, and the works then to be executed were incorporated with and formed part of the original undertaking. That this Court would not interfere upon an application by a shareholder, rais-

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(a) 3 My. & Cr. 439.

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per annum should be guaranteed until the 15th of March, 1847, on all calls paid and on all sums received in anticipation of calls by authority of the board of directors in respect of such half-shares: and that the guarantee should not exclude the shareholders from participating in any higher rate of dividend for the time being payable on the whole shares.

In pursuance and on the terms of this resolution, the directors on the 15th of March, 1847, issued 20,000 half-shares of 25*l* each. Under these circumstances there were two classes of shareholders, namely, the holders of the original or 50*l* shares, and the holders of the 25*l* or half-shares. The plaintiff belonged to the first class, as being the holder of or interested in a great many original shares, and having paid about 70,000*l* for calls thereon; but was not the holder of any 25*l* or half-shares. It was said, that the Company had borrowed all the money they were entitled to raise on mortgage or bond; and that the railway had been completed and opened for traffic from Exeter to Plymouth, a distance of fifty-seven miles, and was yielding a considerable yearly revenue, but that no dividend had been declared on either the whole or the half-shares.

In this state of things differences arose between the shareholders of the two classes as to the true meaning and effect of the resolution of the 19th of January, 1847. The plaintiff, who was interested only in the whole shares, by his bill alleged, that the directors were largely interested in the half-shares; and, although the holders of the half-shares were entitled to such and only such privileges as were given to them by the resolution of the 19th of January, 1847, yet the directors, in the year 1850, introduced, or caused to be introduced, into Parliament a bill purporting to empower the Company to create new shares to an amount not exceeding 625,000*l*, to bear interest in perpetuity at any rate not exceeding 6*l* per cent. per annum; and the plaintiff apprehending that the effect of such bill, if passed

into a law, would be to alter the existing and established rights of the holders of the original shares, and the holders of the half-shares in the Company as between themselves, and to vary the terms upon which the half-shares had been created, applied to be heard before the committee of the House of Commons, to which the bill was referred, and the committee reported that the preamble of the bill was not proved, and the bill was for that time abandoned.

The directors, however, continued to attend to the subject, and with a view to the difficulties arising out of the opposing claims of the two classes of shareholders, a special meeting of the shareholders was held on the 24th of September, 1850; and it was then resolved, that it appeared for the interest of the Company that some equitable arrangement should be made with the holders of the half-shares, with a view to admit both classes of shareholders to an immediate participation in the revenues of the Company; and the directors were requested to put themselves in communication with some of the leading shareholders of both classes, with a view to devise some scheme for the purpose, and that scheme was to be submitted to a meeting of shareholders, to be afterwards convened to consider it.

The directors, having consulted Mr. A., and received a report from him, issued a notice, whereby they convened an extraordinary meeting of the shareholders of the Company, to be held on the 12th of November last, to receive and consider a special report of the directors relative to the proposed commutation of the privileges attached to the 25 $\frac{1}{2}$ or half-shares of the Company referred to the consideration of the board by a resolution of the special meeting of the 24th of September, and also relative to the other matters in the same notice stated. At this meeting, the directors made their own report, stating and recommending a scheme for the proposed commutation of the privileges attached to the 25 $\frac{1}{2}$ or half-shares in the Com-

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passy. The report of the directors was adopted, and the directors were authorised to take all necessary and proper measures for the purpose of giving effect to the recommendations therein contained, and particularly to apply to Parliament for all such additional powers as might be requisite for that purpose: and the bill alleged, that accordingly the directors had taken, and were taking, the necessary steps for that purpose.

The plaintiff now moved for an injunction in the terms of the prayer of his bill.

Mr. Turner, Mr. Stevens, and Mr. Cairns, in support of the motion, contended, that the Act of Parliament, which the directors were attempting to procure, would affect the interest of the shareholders inter se; that they would improperly represent the whole body of shareholders by the use of the corporate seal, as some were dissentient and would be prejudiced by the application. That the principles applicable to private partnerships were also applicable to public companies; that the relation of one partner to the others could not be altered or affected without the consent of all: *Ward v. The Society of Attornies* (a), *Const v. Harris* (b), *Natusch v. Irring* (c), *Attorney-General v. The Corporation of Norwich* (d), *Attorney-General v. The Poor of Southampton* (e), *Munt v. The Shrewsbury, &c., Railway Company* (f), *Attorney-General v. Andrews* (g).

Mr. R. Palmer and Mr. C. Hall, for the defendants, contended, that the step proposed to be taken by the directors, having been authorised by a special meeting of the shareholders, the directors were authorised in carrying into

(a) 1 Coll. 370.
 (b) T. & R. 496.
 (c) Gow on Partnership, App.,
 p. 398.

(d) 16 Sim. 225.
 (e) 17 Sim. 6.
 (f) 13 Beav. 1.
 (g) 2 Mac. & G. 225.

fect the resolutions of the majority of the meeting. That the scheme for which Parliamentary sanction was sought was for the benefit of the whole body of shareholders. That the Court would not interfere to prevent the directors from proceeding to lay their case before the Legislature, who, if it was prejudicial to the interests of any body of shareholders, would reject the application. That the Court would not prevent application to Parliament: *Ware v. The Grand Junction Waterworks Company* (a), *Heathcote v. The North Staffordshire Railway Company* (b), *Parker v. The River Dun Navigation Company* (c).

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Mr. Turner replied.

The MASTER OF THE ROLLS.—I do not think it necessary to discuss the merits of the proposed scheme or the purpose of considering, whether, in itself, and independently of the peculiar circumstances which may in the whole recommend it to the adoption of the Company, it is calculated to promote either its general interest, or the peculiar interest of either of the two classes of shareholders into which it is divided. The plaintiff alleges, that it is calculated to give a benefit to the holders of the half-shares at the expense and to the loss of the holders of the whole shares. It may be so, and it may at the same time be possible that even such an arrangement and such a commutation of the privileges attached to the 5th or half-shares, though at first it would be productive of some loss to the shareholders of the whole shares, may ultimately be so beneficial to the general concerns of the Company as in the end to be profitable to the holders of the whole shares. Into this I do not enter; for it seems

(a) 2 Russ. & My. 484.

(b) Ante, Vol. 6, p. 358.

(c) 1 De G. & S. 192.

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 {
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to me to be clear, that the scheme, if authorised and carried into effect, will very materially alter the existing rights and interests of the two classes of shareholders. It is, I think, admitted that the Company itself has no legal power to do this. Parliament alone has power to authorise it.

I cannot say the nature of the case is such as to make an application to Parliament by the Company for the purpose of authorising the scheme a breach of trust or of duty to the Company. To hold otherwise would, I think, be applying strictly to a Company of this kind the principles admitted to be applicable to a private partnership—private partnerships resting on private contracts, unconnected with public duties and interests, and capable of dissolution.

It was indeed stated, that, if the application to Parliament were made by or in the name of the Company, the plaintiffs and other members of the Company, alleging that they had an adverse interest, would not be allowed to appear in opposition to the bill. I own I have great difficulty in supposing that such is the course of proceeding in Parliamentary committees; but it is said that some instances have occurred in which this has been done; and it is, therefore, satisfactory to me that there is in this Court such a precedent as is found in the case of *Parker v. The Dun Navigation Company*(a); and in this case the defendants have offered to give the undertaking that was given by the defendants in that case; and upon their giving that undertaking, I am of opinion that I ought not to restrain the defendants from using the name or seal of the Company for the introducing or prosecuting of the bill.

It is plain, that using the name or seal of the Company may subject the Company to some liability; and if the

(a) 1 De G. & S. 192.

bill should not pass, or if it should pass without a clause authorising the payment of the costs out of the funds of the Company or other funds, it may be a question hereafter how those costs ought to be paid,—that seems to me to be a question which the Company in their authorised proceedings may be left to deal with when it arises,—and in respect of such future liabilities, I think I ought not now to interfere. But, as to the present funds of the Company, the case seems to be different. Those funds consist of monies paid or subscribed for the general purposes of the Company, for the purposes in which all the shareholders of the Company are interested, according to the contracts now subsisting between them: it is beyond the power of the Company itself to alter and modify these contracts; and I think it is reasonable, and within the jurisdiction of this Court, until legal authority is obtained, to restrain the defendants from applying the funds or money of the Company now in their hands in or towards the payment of the costs of so much of the bill as proposes to effect the scheme for the commutation of the privileges attached to the 25*l.* or half-shares.

The counsel on behalf of the defendants then gave the undertaking alluded to in the judgment; and the injunction was granted till further order, in the limited terms therein also mentioned.

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BEFORE THE MASTER OF THE ROLLS(a).

April 20th. PRESTON v. THE LIVERPOOL, MANCHESTER, AND NEWCASTLE-UPON-TYNE JUNCTION RAILWAY COMPANY.

In order to induce the plaintiff to withdraw his opposition to a bill in Parliament, H. and Y., on behalf of a projected Railway Company, entered into an agreement with him that he should assent to the Railway being made through his property in the manner laid down in the deposited plans, and that the Company should, in case they obtained an Act of incorporation in the then present or any subsequent session, pay to the plaintiff 1000*l.* for all lands required by the Company for the making of the Railway,

THIS cause, the facts of which are stated in a former report on the argument of the demurrer before Lord Cranworth, then Vice-Chancellor, (*ante*, p. 1), now came on for hearing.

The Vice-Chancellor had given the defendants the option of taking a case for the opinion of a Court of law as to the legal effect of an agreement entered into by the plaintiff with Messrs. Harper and Yates, executive directors of the Lancashire and North Yorkshire Railway Company, or of having their demurrer overruled. No case was submitted by the defendants for the opinion of a Court of law; but, in their answer, with reference to the statement in the bill, that the Company had after their incorporation adopted the agreement, the defendants set out an entry from the proceedings of the Railway Company of the 4th of March, 1846: "That Mr. Yates reported, that he had entered into an agreement with the plaintiff to the effect stated in the bill;" and the defendants admitted, "that, upon the faith and understanding that such agreement was conditional (i. e. on the making of the

and a further sum of 4000*l.* for residential injury. That the Company should construct a tunnel in manner therein mentioned; and that the Company should cause a station to be made at the village F., with all proper approaches, the land required for such station and approaches to be furnished by the plaintiff. The agreement was signed by H. and Y., and the plaintiff withdrew his opposition. The Company were duly incorporated, but, having abandoned the undertaking, the plaintiff filed his bill for specific performance of the contract.

Held, that the incorporated Company had not adopted or taken the benefit of the agreement, so as to bind themselves equitably to perform it. That, although a Company cannot legally bind itself except by deed under the corporate seal, yet it may equitably bind itself by adoption, or by perception of a benefit under a contract.

(a) Sir J. Romilly.

proposed railway) but not otherwise, the general committee of directors of the said Lancashire and North Yorkshire Railway Company, previously to the incorporation of the defendants, approved and confirmed among other agreements the said agreement with the plaintiff; but deny, that, save as aforesaid, the said agreement has been adopted by them either before or since the incorporation of the Company. The plaintiff, after the argument on the demurrer, amended his bill by stating the agreement in extenso, but did not adduce any other evidence in support of his case.

The agreement was in the following words:—

“ 5th February, 1846.

“ Memorandum of agreement this day made between the executive directors of the Lancashire and North Yorkshire Railway Company, of the one part, and C. Preston, of Flasby-hall, in the county of York, Esq., of the other part. It is agreed, that, on the following conditions, the said C. Preston will and does assent to the railway being made through his property at Flasby-hall, as laid down in the deposited plans of the said Company; that, in case the said Company shall in this or any subsequent session obtain an Act of incorporation, the said Company shall pay to the said C. Preston, his heirs or assigns, the sum of 1000*l*. for all lands required by the Company for the making of the railway, and a further sum of 4000*l*. for residential injury to the estate and hall of the said C. Preston. Secondly, that the tunnel and railway shall be so constructed through Mr. Preston's property, near the Low Wood, as not to damage the said wood; but, in case any damage shall be done, then the amount of injury shall be ascertained by referees (therein named). Thirdly, that the tunnel shall be extended to the plantation next to the ‘Black-lane.’ Fourthly, that the Company shall cause a proper station to be made at the village of Flasby, with all proper approaches thereto; the land required for such

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station and approaches to be furnished by the said C. Preston at his own expense, and not to exceed half an acre; that the Company shall pay the expenses of Mr. Preston's solicitor on the business, and 25*l.* for his personal expenses."

Although the time for the completion of the works had not expired, it was not pretended by the defendants that they intended to proceed with the undertaking.

Mr. *Elmsley* and Mr. *Southgate* for the plaintiff, in addition to the arguments used before the Vice-Chancellor in opposition to the demurrer, contended that the defendants had nowhere stated that they could not now perform their contract. That the plaintiff could not enforce his rights at law, as in *Webb v. The Direct London and Portsmouth Railway Company*(a), because, in the present case, no time was fixed for the payment of the stipulated sum. That, in the case referred to, not only was the time fixed, but there was an indenture under seal. That, although the powers of the Company to make the line had now expired, they were in existence at the date of the filing of the bill. That, if the Company had then required the land, it was quite clear they could have enforced the contract against the plaintiff; and, in fact, that the Railway Company had no power to abandon the undertaking during the continuance of their powers. That laches could not be imputed to the plaintiff, as he was expecting, up to the last moment, that the Railway Company would complete their purchase.—They also cited *Lord J. Stuart v. The London and North Western Railway Company*(b), *Sanderson v. The Cockermouth Railway Company*(c), *Southcomb v. The Bishop of Exeter*(d), *Gage v. The Newmarket Railway Company*(e).

(a) Ante, p. 9.

(b) Ante, p. 25.

(c) 11 Beav. 497.

(d) 6 Hare, 213.

(e) Ante, p. 168.

The *Solicitor General* (with whom were Mr. *Palmer* and Mr. *J. H. Humphreys*) was not called on. But, in the course of the argument for the plaintiff, he stated, that this case in no way differed in principle from *Gooday v. The Colchester and Stour Valley Railway Company* (a).

The Master of the Rolls, in the course of the argument, observed, that he could not enforce the contract partially; and that, if the Railway Company did not make their line, it was clear the Court could not compel them to build a station, or require the plaintiff to furnish the land necessary for that purpose. He also stated, that he did not consider himself bound by *Hawkes v. The Eastern Counties Railway Company* (b), as a distinct contract had been concluded between the parties in that case. His Honour then delivered his judgment as follows:—

THE MASTER OF THE ROLLS.—It does not appear to me that any legal agreement was ever constituted between the plaintiff and the defendants (the Railway Company). In fact, a Company cannot legally bind itself except by some instrument under its seal. It is however true, that a Company may be bound by an agreement, as an individual may, though made between other parties, if it think it to adopt and take the benefit of that agreement. I have no doubt that the Company may be bound under those circumstances. Without entering into the question which I decided in *Gooday v. The Colchester and Stour Valley Railway Company*, and even if that case was not so decided, I do not find in this sufficient acts of confirmation and adoption of the agreement to bind the defendants.

The decision to which I have come is not inconsistent with that of Lord *Cranworth* upon the hearing of the de-

(a) *Ante*, p. 375.

(b) *Ante*, p. 188.

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murrer; for not only was the agreement then imperfectly stated, the first clause only having been inserted and the third omitted, which certainly had a very material bearing on the construction to be put upon the first—viz whether the construction necessarily to be put upon the third clause does not attach upon the first; but, in addition to that, I find charges in the bill which distinctly state the adoption by the Company of this very agreement.

Assuming the statements to be true, as would be the case on the argument of the demurrer, it does not appear to me difficult to support the bill, unless it was manifest that the agreement was bad on the face of it. The Vice-Chancellor could not have done otherwise than have overruled the demurrer. The case, however, comes in a very different aspect before me, and I do not see how I can enforce the contract. It is clear, that, if the undertaking had been carried into effect, the Company would have taken the benefit of this agreement, and they intended to have taken the benefit of it. I shall, therefore, dismiss the bill, but without costs.

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COURT OF COMMON PLEAS.

Hilary Term, 1854.

MANCHESTER, SHEFFIELD AND LINCOLNSHIRE RAILWAY
COMPANY, Appellants; WALLIS and Another, Respondents.

*Nov. 11th;
Jan. 23rd.*

It was an appeal from the county court of Lincoln-
holden at Lincoln. The case stated that the re-
spondents, the plaintiffs in the county court, filed a plaint
against the appellants, the defendants in the county court,
alleged by their particulars 35*l.*, the value of two
horses belonging to the plaintiffs, killed or otherwise seri-
ously injured upon the defendants' line of railway, through
negligence of the defendants, in consequence of the
defendants, their agents or servants, having left open the
gates and other openings leading on to their railway at or
near to the station at Torksey; in consequence of which
negligence the horses got upon the line of railway, and
were killed or otherwise injured by the engine or train
passing to the defendants running against or upon
it. The case was tried with a jury, when the following
facts were proved in evidence:—On the 13th of January,
1854, the plaintiffs, who are farmers in the parish of
Torksey in the county of Lincoln, had two horses grazing
in a close in that parish in the plaintiffs' occupation,
through which two public highways pass. At each end
of the close there is a gate to prevent the cattle grazing in
the close from straying out of the close; and these gates
are continuous with, and form part of, the plaintiffs' fence.
On the day in question, it is supposed that the east gate,

The Railways
Clauses Conso-
lidation Act,
8 & 9 Vict.
c. 20, s. 68,
"That a Rail-
way Company
shall make and
maintain suffi-
cient fences
for separating
the land taken
by the Railway
from the adjoin-
ing lands not
taken, and pro-
tecting such
land from tres-
pass or the
cattle of the
owners or occu-
piers thereof
from straying
thereout by
reason of the
railway," ex-
tends to the
making and
maintaining a
fence between
the railway
land and a high-
way running
alongside of it.

But when cat-
tle are straying
on the highway
and not law-
fully passing
along it, the
owner of them
cannot main-

tain an action against the Company for injury occurring to them from their getting on the railway,
in consequence of a defect in the fence between it and the highway, as the owner in such case is not, in law,
the occupier of the highway, and there is no obligation to maintain the fence as against him, either
by statute or at common law.

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leading to the village of Torksey, must have been left open by some person or persons using the highway, and that the plaintiffs' horses in consequence went through the said east gate upon the highway leading to the village of Torksey. About 100 yards from the said east gate of the said close is a gate leading into the station-yard of the defendants at Torksey. This gate is so constructed as to swing backwards and forwards, and close of itself, and will not remain open unless propped, so as to keep it open; it is, however, frequently propped open during the day, but is closed and locked at night. The horses strayed through the gate from the highway on the day in question into the station-yard, from which yard they were turned out into the highway again by one of the defendants' servants, about six o'clock in the afternoon. At some time before the gate was closed for the night, but at what precise time was not shewn, they again entered the station-yard, where they were accidentally locked in by one of the defendants' servants, and their footmarks were traced through the gate to the station-yard, and thence through an opening in the fence (which had been made by the defendants' servants, by taking down the rails for the purpose of carrying or carting something from or to the railway, and which fence separates the station-yard from the line of railway,) to and upon the railway, where they were killed by the passing of a goods train. One of the plaintiffs, upon cross-examination, admitted that he believed, that, if the gate of the plaintiffs' close (which he had no doubt had been left open by travellers using the high road through the said close) had been shut, the accident would not have happened. No evidence was given how or by whose act the gate of the station-yard was opened and left open; but evidence was given that the said gate leading into the station-yard was frequently left open, and that cattle had been seen to stray through, and that the defendants had been warned about leaving it open, and

that the gate had been kept shut since the said two horses were killed. Upon the above state of facts it was contended, on the part of the plaintiffs, that the defendants were liable to make good the loss of the horses, by reason of the alleged negligence in permitting the gate of the station to remain open, and the defect in the fence dividing the station-yard from the line. On the part of the defendants, it was contended, that there was no case to go to the jury, inasmuch as, admitting the facts proved by the plaintiffs, the defendants were not liable. The learned judge, however, having refused to nonsuit, the advocate for the defendants addressed the jury, and contended, that there was no negligence, nor any breach of duty on the part of the defendants; that the accident was occasioned by, and directly attributable to, the negligence of the plaintiffs, in not keeping the gate of their field closed, and that they were not entitled to recover. The learned judge put two questions to the jury—first, whether they were of opinion that there had been negligence on the part of the defendants, and that the injury of which the plaintiffs complained was to be attributed to their negligence; and, secondly, whether the plaintiffs had been guilty of any negligence which contributed in any way to the accident. The jury found that the defendants had been guilty of negligence, and that the plaintiffs had not been guilty of any negligence which contributed to the accident, and found a verdict for the plaintiffs, with 35*l.* damages. The defendants, being dissatisfied with the decision of the judge in point of law, presented this appeal, contending that there was no case which ought to have been submitted to the jury, and that the ruling and decision of the judge were, and each of them was, erroneous.

J. Addison (Nov. 11) for the appellants.—A nonsuit should have been directed: for the defendants were not lia-

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ble under the circumstances stated. The case of *Furness v. The York and North Midland Railway Company* (a) was relied on by the plaintiffs in the Court below; but that case is clearly distinguishable, as it turned on the 9th sect. of the 5 & 6 Vict. c. 55, requiring the Company to erect and keep closed, at all times, gates across the road at level crossings: the 47th section of the Act now in force, 8 & 9 Vict. c. 20, corresponds to the old 9th section; but it cannot apply to the present case, as the road does not cross, but runs parallel to the railway. The only obligation imposed on the defendants by statute, which can be said to apply in the present case, is that of the 68th section of 8 & 9 Vict. c. 20, which enacts, that "the company shall make, and at all times thereafter maintain, for the accommodation of the owners or occupiers of lands adjoining the railway sufficient posts, rails, hedges, or other fences for separating the land taken for the use of the railway from the adjoining lands not taken, and protecting such lands from trespass, or the cattle of the owners or occupiers thereof from straying thereout by reason of the railway, together with all necessary gates, made to open towards such adjoining lands and not towards the railway." Now, the defect in the fence here was in a fence between the company's land (that is, land taken,) and the highway; and it may well be doubted, whether "adjoining land not taken" can be said to include a highway. But, even assuming that it can, the obligation by statute to keep up the fence is only as against the owners or occupiers of the adjoining land; and the obligation at common law is not more extensive. *Ricketts v. The East and West India Docks and Birmingham Railway Company* (b) is expressly in point for this; and the facts stated shew, that the plaintiffs' horses had strayed, and were therefore not passing along

(a) 16 Q. B. 610.

(b) *Ante*, p. 295; 21 L. J., C. P., 201.

the highway; and the plaintiffs were therefore trespassers, and not lawfully occupying the adjoining land so as to enable them to maintain this action.

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Gray for the respondents.—The 68th section of the Railways Clauses Consolidation Act makes it imperative on the defendants to maintain the fence between their railway and the high road, for it is clearly land adjoining the railway. Now, every one has a right to use the high road by his cattle; and the defendants are liable, through a defect in the fence, the cattle get on to the railway and suffer damage. In *Ricketts v. The East and West India Docks and Birmingham Junction Railway Company* the sheep were trespassers on the adjoining close. [*Jervis, C. J.*—If cattle are lawfully passing on the highway, the owner of the adjoining close, being bound to keep up the fence, cannot distrain them if they get on his land through defect in the fence; but if they were unlawfully on the road, he may: *Dovaston v. Payne* (a). But you would say, that is not conclusive.] Yes, that case does not shew, that, if the cattle had suffered damage through the negligence of the owner of the close, he would have been exempted from liability, merely because they were straying on the road. If cattle are straying on the highway, the owner is liable to have them distrained, no doubt; but it does not follow that he may not also have a right of action for an injury caused by the negligence of another: *Davies v. Mann* (b), *Bird v. Holbrook* (c). In *Fawcett v. The York and North Midland Railway Company*, the horses were straying on the road; but this Court held, that, as against the Company, they were lawfully there. [*Jervis, C. J.*—The distinction pointed out by the counsel for the appellants between that case and the present is the true one; the Company were there

(a) 2 H. Blac. 527. (b) 10 M. & W. 546. (c) 4 Bing. 628.

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bound to keep the gate shut as against all the world; here, the only duty of the defendants is to maintain the fence as against the owners or occupiers of the adjoining land] In *Barnes v. Ward* (a), *Maule*, J., in delivering the judgment of the Court, makes this observation: "With regard to the objection that the deceased was a trespasser on the defendant's land at the time the injury was sustained, it by no means follows from this circumstance that the action cannot be maintained. A trespasser is liable to an action for the injury which he does, but he does not forfeit his right of action for an injury sustained." [*Williams*, J. —The decision in that case was grounded on the fact that the defendant's act amounted to a nuisance.]

J. Addison replied.

Cur. adv. vult.

JERVIS, C. J., (Jan. 23) delivered the judgment of the Court (b).

After the finding of the jury, we must assume that the cattle of the respondents, without any fault on the part of the respondents, strayed into the public road adjoining the railway, and, through a defect of the appellants' fences, got upon the railway, where they were killed. The question is, whether, upon these facts, the appellants are liable to this action; and we are of opinion that they are not. This is not the case of a railway crossing the highway on a level, with a gate on either side of the railway, but of a highway running alongside of the railway. The only enactment that is applicable to such a case is the 68th section of the Railways Clauses Consolidation Act, 8 & 9 Vict. c. 20, which provides, "That the Company shall make, and at all times thereafter maintain, the following works for the accommodation of the owners and occupiers

(a) 9 C. B. 420.

(b) *Jervis*, C. J., *Maule*, J., *Williams*, J., and *Talfourd*, J.

of land adjoining the railway, that is to say," amongst other things, "sufficient posts, rails, hedges, ditches, mounds, or other fences, for separating the land taken for the use of the railway from the adjoining lands not taken, and protecting such lands from trespass, or the cattle of the owners or occupiers thereof from straying thereout, by reason of the railway, together with all necessary gates made to open towards such adjoining lands, and not towards the railway." Certainly, this section makes a very insufficient provision for the protection of the public where a railway runs alongside a public highway; but, nevertheless, it is clear that this clause was intended to apply to such a case as this, for, if not, there is no section which casts the obligation to fence upon a Railway Company in such cases. The highway, therefore, is to be considered to be "adjoining land not taken;" and the same construction must be put upon the same words, whether that adjoining land be a public highway or a private close. What, then, is the nature of the obligation cast upon the Railway Company by this section? They are bound to fence, so as to keep the cattle of the owners or occupiers of "adjoining lands not taken" from straying thereout. In *Ricketts v. The East and West India Docks and Birmingham Junction Railway Company* (a), this Court has already determined, that the obligation of a Railway Company, by this section, is the same as it would have been at common law, if they had been bound by prescription to repair the fence; in other words, they are only bound to keep up the fences against the cattle of the owners and occupiers of the adjoining lands. Were, then, the cattle of the respondents at the time they were killed the cattle of the owners or occupiers of the adjoining land, the highway? We think they were not; and the case of *Dovaston v. Payne* (b) appears to us to decide that question. Whilst cattle are

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(a) Ante, p. 295.

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passing along a highway, the owners of them are using it according to the dedication of the owner of the soil, and, being there with his consent, the owners of such cattle are strictly occupying the highway. If, therefore, while passing along the road, they stray into an adjoining field, the owner of that field cannot distrain them damage feasant, if he was bound to keep up the fence against the road; but if, instead of passing along the road, the cattle had strayed there, they might, if they escaped into an adjoining close, be distrained damage feasant, notwithstanding the owner of that close was bound to repair the fence between his close and the road, because the cattle were wrongfully on the road, and the owners of those cattle were not, therefore, occupying it so as to cast any obligation to repair the fence upon the distrainer. Applying this decision, and the principles thus established, to the present question, we are of opinion that the owners of the cattle, the respondents, were not occupying the road with their cattle, which strayed on to the road; and that therefore there was no obligation upon the appellants to maintain a fence against them. If, then, there was no obligation to maintain the fences against the respondents' cattle, the appellants were guilty of no wrong in omitting to do so. There is no complaint that the railway was conducted improperly; the only complaint is, that the fence was not sufficient. The legislature, with a full knowledge of the dangers of railways, has cast on the Companies a limited obligation only, and we cannot enlarge it, merely because the public safety may be endangered. This distinguishes this case from the cases cited. In *Fawcett v. The York and North Midland Railway Company*, the Company were required, by the express words of the statute, to keep the gate closed across the road under all circumstances, and they were guilty of a wrong in omitting to do so. *Bird v. Holbrook* was decided on the ground that it was unlawful to set up spring-guns, and

that therefore the defendants were liable, although the plaintiff was a trespasser; and *Barnes v. Ward* was determined on the ground that the area close to the public highway, into which the plaintiff fell, was a public nuisance. If the appellants had been guilty of a wrongful act, there are many cases to shew that the respondents would not lose their remedy, merely because their cattle were trespassers; but, in this case, there was no wrongful act, and the obligation to repair does not exist, the cattle being trespassers, and the owners of them, therefore, not occupying any part of the adjoining lands, in the language of the Act of Parliament. We therefore think the appeal must be allowed, with costs.

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Appeal allowed, with costs.

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COMPANY.

Jan. 17th.

THIS was a case stated for the opinion of this Court by an arbitrator, pursuant to a power contained in an order

The defendants, a Railway Company, advertised themselves to carry parcels, &c. from London to Glasgow (though their own line ended at Preston), and habitually received, booked, and carried parcels of all descriptions from London to Glasgow (receiving prepayment for the whole distance), having made arrangements with the other Companies, by which the defendants' vans, being locked in London, were carried through from Preston to Glasgow, under the management and by the locomotive power of the other Companies.

The defendants had issued written orders to their servants, that "packed" parcels be invoiced to termini of the defendants' line only. The plaintiff had received notice of this order, but it had never been enforced against any one but the plaintiff, and the defendants had knowingly carried packed parcels from London to Glasgow since the order was issued; but they refused to carry a packed parcel for the plaintiff further than Preston:—*Held*, first, that, by the 8 & 9 Vict. c. 20, ss. 86, 87, and 89, the defendants were left in the position of common carriers; and that, having held themselves out, and acted, as common carriers from London to Glasgow, they were bound by the common law to receive and carry all goods tendered them to be carried from London to Glasgow, although the latter place was out of England. Secondly, that, being common carriers, and having carried packed parcels for some persons, they were bound to carry them for all.

Seemle, that a common carrier cannot, in any case, refuse to carry "packed" parcels.

Held, also, that a common carrier has no right, in all cases, and under all circumstances, to demand what are the contents of a parcel tendered to him to be carried, and cannot justify his refusal to carry, simply on the ground that information as to its contents was refused.

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under which this cause was referred. The following are the material facts of the case:—

The questions arise on the first and seventh counts of the declaration, and the pleadings thereto. They are as follow:—First count. “That the defendants were common carriers of goods and chattels for hire from Euston-square station, in the county of Middlesex, to Glasgow, in that part of the United Kingdom called Scotland; and thereupon, heretofore, to wit, on the 10th day of October, A.D. 1850, the plaintiff caused to be tendered to the defendants, they being such common carriers as aforesaid, at Euston-square station aforesaid, being the place by them then used, in the way of their said business as common carriers, for the receipt of parcels and goods to be by them carried and conveyed as such common carriers as aforesaid, a certain package of the plaintiff containing divers goods, to wit, &c.; and then requested the defendants to receive and to carry and convey the same from Euston-square station aforesaid to Glasgow aforesaid; and the defendants then had ample convenience for receiving and carrying the same according to the said requirement of the plaintiff in that behalf; and the plaintiff was then ready and willing and then offered to pay to the defendants such sum of money as the defendants were legally entitled to receive for the receipt and carriage and conveyance of the said package of goods from Euston-square station aforesaid to Glasgow aforesaid, and all other charges whatsoever which the defendants were then authorised or entitled to make or receive for the receipt, carriage, and conveyance of the said package of goods in manner as aforesaid, to wit, the sum of 4s. 10d.; and the defendants then had notice of the premises. Yet the defendants, not regarding their duty as such common carriers as aforesaid, but contriving and wrongfully and unjustly intending to injure the plaintiff, though they did receive as aforesaid, and carry and convey, the goods of divers other persons on

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that occasion from Euston-square station aforesaid to Glasgow aforesaid, did not nor would, at the said time when they were so requested as aforesaid, or at any time afterwards, carry or convey the said package of goods from Euston-square station aforesaid to Glasgow aforesaid, at or for the said sum of money so offered to them by the plaintiff as aforesaid, or otherwise, but wholly neglected and refused so to do, though they might and could and ought as such carriers to have received, carried, and conveyed the same as aforesaid at and for the sum of money aforesaid; whereby the plaintiff was then forced and obliged to and did procure the said package of goods to be carried and conveyed from Euston-square station aforesaid to Glasgow aforesaid, at much greater expense than the said sum of money so offered by him to the defendants as aforesaid, to wit, the expense of 10s.; and was also delayed in the conveyance of the said package of goods as aforesaid for a long time, to wit forty-eight hours then next following." The seventh count was exactly similar, *mutatis mutandis*, for not carrying from Euston-square station to Sheffield, in the county of York.

To these counts the defendants pleaded:—First, Not guilty; secondly, to the first count, that the defendants were not common carriers of goods and chattels for hire from Euston-square station to Glasgow, in that part of the United Kingdom called Scotland, in manner and form as the plaintiff has in the said first count alleged. The defendants' thirty-second plea was to the seventh count, and was a similar plea to the second, *mutatis mutandis*; and upon these pleas issue was joined.

The fifty-seventh plea was to the first and seventh counts (and other counts), and was as follows:—"That, at the time of the making of the tender of each of the packages in those counts mentioned, the defendants requested the plaintiff to inform them of the contents of such package, with which request the plaintiff always wholly refused to

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comply, and did not nor would ever inform the defendants of the contents of such package, and always required the defendants to receive such packages, and carry and convey the same, without being informed of the contents of such package; wherefore, and because the defendants did not know what such packages respectively contained, they the defendants, at the said several times when &c., in the said counts mentioned respectively, would not receive, carry, and convey the said packages respectively, but refused to receive the same respectively, and refused to carry and convey the same respectively, according to the plaintiff's respective requirements in that behalf, as they lawfully might for the cause aforesaid. And this the defendants are ready to verify" &c. To this the plaintiff replied *de injuriâ*.

[The fifty-eighth and fifty-ninth pleas, to which the plaintiff demurred, raised the question, whether the defendants could be common carriers beyond the limits of their own line, anything done beyond such limits being *ultra vires*; but these pleas were abandoned by the defendants' counsel on the argument.]

The plaintiff is a small-parcels collector and carrier, he has receiving offices in various parts of London, at which his agents receive parcels directed to parties in the country. These are collected at the plaintiff's Central Office in Tudor-street, Blackfriars, where they are sorted, and all the parcels for one town are packed into one parcel, which is then directed and forwarded, by rail or otherwise, to the plaintiff's agent in that town, and by him opened and distributed to the various parties to whom they are directed. This mode of packing parcels effects a saving in the cost of conveyance, and there is less risk of loss, and less trouble.

The plaintiff has agents at Sheffield and Glasgow, and other places, for the above purpose.

Formerly, the plaintiff used to send these packed parcels

by waggon and coach; but, since the introduction of railways, these modes of conveyance no longer exist, and the plaintiff is compelled to send, and does send, these parcels by railway, without which he could not carry on his business, there being no other mode of conveyance.

During the year 1850 there was no other railway which carried to Birmingham than the defendants'. For each of the packages so forwarded the plaintiff makes a charge. The plaintiff has carried on this business for the last thirty years, and is not the only person who has made a trade of collecting and forwarding packed parcels in the manner described. The practice of packing and sending parcels as above described has been always well known, and in common use in the carrying trade, and has been always in use amongst the wholesale houses in the stationery, woollen, and other trades, although they do not make a business or profit of it as is done by the plaintiff. They, however, commonly inclose in packages for their country customers parcels from other London houses, sometimes for the same, and sometimes for different consignees, but all in the same parcel, and for this they take 2d. a parcel. This practice was well known to the defendants, and it has always been the defendants' course of business to receive, book, and carry packed parcels from London to Glasgow or Sheffield throughout from such wholesale houses, either with or without prepayment, and without objection to their being packed parcels, and knowing them to be such. The defendants are incorporated under the 9 & 10 Vict. c. cciv.; and, by the 2nd section, the powers of the 8 & 9 Vict. cc. 16 and 20 are extended thereto.

The defendants' line towards Sheffield ends at Rugby, thence to Sheffield is the line of the Midland Railway Company. The defendants' line towards Glasgow ends at Preston, thence to Lancaster is the Lancaster and Preston Junction, from Lancaster to Carlisle is the Lancaster and Carlisle Railway, and from Carlisle to Glasgow is the

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Caledonian Railway. These Companies are also established by various statutes.

Although the defendants' line ends at Preston and Rugby respectively, yet the defendants, at the times in question, were and have always been accustomed to book and receive and carry passengers, goods, and parcels of all descriptions to be carried, and have constantly so carried them, beyond the limits of their own lines, and over those of the above Companies, and so through to Glasgow and Sheffield respectively, receiving the price of the carriage for the whole distance. Such was their ordinary course of business before and at the times in question, and is so still; and the defendants also advertise and hold themselves out to the public as carriers of passengers and parcels through from London to Glasgow and Sheffield respectively, at certain rates laid down in their published tables. Amongst others of the public, the defendants have, from time to time, carried for the plaintiff from London to Glasgow and Sheffield respectively. The defendants have been and are enabled to carry beyond the limits of their own lines to Glasgow and Sheffield by means of arrangement with the above Railway Companies; but of the nature of such arrangement, or the fact of its existence, the plaintiff had neither notice nor knowledge. The nature of such arrangement is as follows:—The trains destined to go through from London to Glasgow and Sheffield respectively, are composed ordinarily of the defendants' carriages, which are suffered by the other Companies to proceed right through without change. The Sheffield trains from London to Rugby are in charge of the defendants' servants; but at Rugby they are taken charge of and conducted forward by the servants and locomotive engines of the Midland Railway Company. The trains to Glasgow are conducted by the defendants' servants as far as Preston, from which place they are conducted onwards by the servants and locomotives of the Northern Companies before

ioned, except that from Preston to Carlisle the defendants find locomotive power, which they do under a disagreement between them and the Lancaster and Carlisle Railway Company. Parcels booked by the defendants through to Sheffield or Glasgow are entered on a Sheffield or Glasgow waybill, and pass through in a Sheffield or Glasgow van belonging to the defendants the entire journey without disturbance or delay. The van is locked, the key is kept by the defendants in London and Sheffield or Glasgow respectively; but at no intermediate place is the key kept, nor can any access be there had to the goods in the van.

The corresponding arrangements between the Companies of the Caledonian Railway Company are enabled to and do receive, book, and carry parcels and passengers through Glasgow to London; and the same holds with respect to the Midland Railway Company from Sheffield. At the clearing house in London accounts are periodically settled between the different Railway Companies, including the defendants and the Midland Railway Company, and also the Lancaster and Carlisle and the Caledonian Company; the sums received for carriage of through passengers and parcels are divided between the various Companies in proportion to the lengths of their respective lines. Accounts are also periodically settled at the clearing house between the respective Companies in respect of the carriage of passengers and parcels vans of the above Companies, which from time to time have run over each others' lines with passengers and parcels both to and from London.

The clearing house is now regulated by the "Railway Clearing Act, 1850," 13 & 14 Vict. c. 103; and prior to the passing of that Act was conducted on the system there laid out.

In July, 1849, the defendants issued to their servants the following orders with respect to packed parcels:—

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" London and North Western Railway,

" Euston Station, 3rd July, 1849.

" Extract from Minutes of Proceedings.

" 19th June, 1849.

" On the subject of packed parcels:—

" 1. That parcels be invoiced to termini of the London and North Western line only.

" 2. That all be prepaid over this line.

" 3. That no money be paid by this Company on any such packages when delivered to us by any other Company or carrier or other person."

The plaintiff was informed of the above orders. They had not been revoked at the times in question; but they had never been enforced against any one but the plaintiff, although between July and October, 1850, numerous packed parcels, and known by the defendants to be such, were, in the ordinary course of the defendants' carrying business, received and booked by the defendants, and by them carried both to Glasgow and Sheffield from the various wholesale houses in London in the ordinary way, both with and without being prepaid.

On the 3rd of September, 1849, Grew (the agent and manager at Rugby, both for the Midland Railway Company and the defendants) received from the Midland Railway Company an order in the following terms:—

" Midland Railway.

" Memorandum, Derby to Rugby Station.

" Monday the 3rd of September, 1849.

" Dear Sir,—I send you below copy of an order from the committee of management respecting packed parcels, which must in future be charged the ordinary rates

" Yours truly,

" Mr. GREW.

" C. MILLS."

"1. That parcels be entered to the termini of the Midland lines only.

"2. That all be prepaid on this line.

"3. That no money be paid by this Company on any such packages when delivered to us by any other Company or carrier or other person.

C. MILLS."

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The plaintiff was informed of this order.

No similar order to that of the 3rd of September, 1849, was made either by the Lancaster and Carlisle, or by the Caledonian Railway Company.

On the 21st of October, 1850, the plaintiff, in the ordinary course of his business, took a parcel to the defendants' station at Euston-square, and delivered it to the defendants in time for their mail train for Sheffield; the weight was 18lbs.; it was directed:—

"London, 21st October, 1850, Mail Train, weight 18lbs. Mr. G. Briggs, 19, Norfolk-street, Sheffield, carrier. Paid to Sheffield."

It contained two small parcels, directed to and intended by the plaintiff to be delivered by Briggs to two different consignees at Sheffield. Briggs was the plaintiff's agent at Sheffield for that purpose.

The plaintiff delivered the package at the station to the defendants, and tendered them 2s. 5d. for the carriage to Sheffield by the above mail train. 2s. 5d. was the charge receivable and received by the Company for parcels of that weight booked by them through to Sheffield by the above mail train.

The defendants, on the package being tendered, asked if it was a packed parcel.

Plaintiff admitted it was. Defendants then inquired the contents of each inclosed parcel; the plaintiff said he did not know and could not give them. Defendants said, they would not receive and book the parcel to Sheffield,

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they would only take the carriage of packed parcels to the extent of their own line; and that they would not carry it beyond Rugby. The plaintiff protested, and urged it should be carried to Sheffield, which defendants refused. Defendants were willing to take the amount of the carriage to Rugby. The plaintiff paid them 1s. 2d. for the carriage to Rugby, with 2d. booking. These were the usual charges for booking and carriage to Rugby by mail train.

The package was taken that evening by the said mail train to Rugby, but no further by the defendants, where it arrived the next morning at 12.5 A.M. of the 22nd of October. It was then removed from the said mail train, and delivered to the Midland Railway Company; by whom it was forwarded by a train belonging to the said Midland Company, which left Rugby at 6.45 A.M. on the 22nd of October, and arrived at Sheffield at 11.55 A.M., and was there delivered to Briggs about 1 P.M. of the same day.

Briggs had to pay and paid 1s. 6d. for the carriage from Rugby to Sheffield to the said Midland Railway Company, to whom the defendants had delivered it at Rugby as aforesaid, and by whom it was forwarded to plaintiff at Sheffield, and there delivered as aforesaid.

Had it gone by the said mail train to Sheffield direct, it would have reached that place at 4.15 A.M. of 22nd October, and would have been delivered to Briggs at 7 A.M. of that day.

Briggs, on the receipt of the package, delivered the contents to the consignees.

On the 21st of October, the defendants received packages from other persons for the above mail train, and booked them for Sheffield; and such packages were forwarded by the above mail train, and were by it carried to Sheffield without detention at Rugby.

At Sheffield, such packages were delivered out to the consignees there between 7 and 8 A.M. of the 22nd of October.

On the 23rd of October, 1850, the plaintiff took and delivered another parcel to the defendants, at their station at Euston-square, weight $16\frac{1}{4}$ lbs., in time for the mail train, directed—

“London, 23rd of October, 1850, per Caledonian Mail-train, to Mr. J. Hinshelwood, 13, Miller-street, Glasgow. Carriage paid throughout.”

This contained five small parcels, directed to and intended to be delivered by Hinshelwood to as many different consignees.

Hinshelwood was the plaintiff's agent at Glasgow for that purpose.

The plaintiff offered the defendants 5s. 6d. for the carriage to Glasgow; 5s. 6d. was the charge receivable and received by the defendants for parcels of that weight booked by them through to Glasgow by mail trains. The defendants, on its being tendered, requested to know whether it was a packed parcel. Plaintiff admitted it was. Defendants then asked the contents of each inclosed parcel. Plaintiff said he did not know and could not give them.

Defendants then said they would not receive and book the parcel to Glasgow; and that it would go no further than Preston.

Plaintiff protested and urged that it should be carried to Glasgow. Plaintiff again requested the parcel might be booked to Glasgow, which defendants refused. Defendants were willing to take the carriage to Preston, and the plaintiff paid them 3s. for the carriage to Preston, and 2d. booking,—3s. is the usual charge to Preston. Defendants took the package by mail train that evening to Preston, (23rd of October), 8.45 p.m. It arrived in the usual course at Preston at 4 next morning, 24th of October.

The defendants carried the parcel no further. It was here removed by them from the Glasgow mail train, and delivered to another Company, by whom it was forwarded

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on by their train, which left Preston same day (the 24th).

It arrived at Glasgow at 8.15 and was delivered to Hinshelwood on the 24th between 8 and 9 A.M. Hinshelwood engaged a carriage from Preston to Glasgow to carry the goods. Had it gone on by the direct, it would have reached Glasgow on the 23rd of October, and would have been delivered to Hinshelwood's servant between 1 and 2 P.M.

Hinshelwood, on receipt of the goods, delivered the contents to the different consignees.

On the 23rd of October, the defendant, in the course of business, received parcels from the plaintiff and booked them through to Glasgow. The parcels were forwarded by the above mail train, and were carried through by the defendant's train. Attention as above at Preston, and delivered to the consignees there, between 1 and 2 P.M. of October, being twenty hours sooner than the parcel was delivered.

No objection was made on either side as to the size or weight of the parcels, nor was any objection made, nor was there any objection existing to either of the parcels being carried by the defendant's train, and carried by the defendant's train to Sheffield and Glasgow respectively. The parcels were packed in proper manner; and but for the defendant's delay, the parcels would then have been delivered through accordingly. The mail train is the dearest. It is a great injury to the plaintiff to have his parcels delayed as above, and to be charged extra.

Upon both the occasions in question, the parcels were booked and carried both ordinary and

(some of them having been prepaid and others not) through by the said mail trains from London to Sheffield and Glasgow respectively. The defendants did not carry either of the said parcels beyond Rugby and Preston respectively, at which places they were delivered over to other Railway Companies, and by them conveyed to their destination, with the delays and under the circumstances described.

And I further find, that the cause of the defendants refusing to receive the said parcels, and to carry and convey the same, was not that the defendants did not know what such packages respectively contained, as in the said fifty-seventh plea is alleged, but because they were packed parcels, and for no other reason.

The defendants contend, that the meaning of the allegation in the declaration, that the defendants were common carriers, is, that they were carriers of goods indiscriminately, and that the above regulations of the defendants as to packed parcels negative the general averment; and then, that the defendants are not in point of law common carriers as alleged. 2ndly, That the defendants are common carriers to the extent of their own line only, even with respect to ordinary parcels. 3rdly, That at all events they are common carriers only to the extent of their own line with respect to packed parcels. 4thly, That, as Glasgow is beyond the realm, the defendants cannot be common carriers, nor bound to carry from London to Glasgow in the sense of the averment in the declaration. 5thly, That defendants cannot be common carriers beyond the limits of their own line, anything done beyond such limits being ultra vires. [This was abandoned in argument.] The plaintiff contends, that the fifty-seventh plea is bad in law, and is not supported by the above facts.

At the request of the parties, and in pursuance of the order of reference, I refer the above facts, so far as they involve questions of law, for the opinion of the Court.

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J. Brown (Crouch with him) for the plaintiff.—The defendants are common carriers beyond their own line. Railways Clauses Consolidation Act, 8 & 9 Vict. c. 47, is incorporated in their private Act; and by the 67th section, any Railway Company is enabled to contract with other Companies for the passage of its vans over the line, and vice versa; and the 89th section expressly makes a Railway Company in the position of a common carrier. The question then is, what liabilities does a common carrier incur, who professes to take goods from a place in England to a place without the realm. The nature of the obligations imposed upon carriers by reason of the exercise by them of a public employment in England, must be governed by the English law, the *lex loci contractus* where the goods are to be received. And the liabilities incurred must be the same throughout the whole journey, whether within or beyond the realm. Now, that a carrier within the realm is liable as an insurer, with certain known exceptions, has been established beyond dispute since the case of *Coggs v. Bernard*(a); and it is also established, that he is bound to accept all goods tendered to him to carry, for which he has accommodation: *Wilson v. Rogers*(b). And it is submitted, that the liability to insure, and the liability to carry, must be co-extensive. But liability as carriers extends equally to carriers by land and water: *Dale v. Hall*(c), *Trent Navigation Company v. Wood*(d); and *Morse v. Slue*(e), which was a much considered case, is an express authority that this liability extends to a carrier who carries beyond the realm. Whether a carrier beyond the realm is bound to carry all persons offering themselves to be carried was discussed, but not decided, in the case of *Benett v. The Peninsular & North Western Navigation Company*(f); but Kent in his *Commentaries*

(a) 2 Ld. Raym. 909.

(b) 2 Show. 327.

(c) 1 Wils. 281.

(d) 3 Esp. 127.

(e) 1 Vent. 190, 235; 2 Ld. Raym. 866; 3 Keb. 72, 112, 135.

(f) 6 C. B. 775.

vol. 2, p. 597, edit. 1840, makes no distinction. The defendants are liable, by reason of their profession to the public, and to the extent of that profession: *Lane v. Cotton*(a), *Johnson v. Midland Railway Company*(b); and this, though the terminus be beyond their own line: *Muschamp v. Lancaster and Preston Railway Company*(c), *Scothorn v. South Staffordshire Railway Company*(d), *Watson v. Ambergate Railway Company*(e). Nor can it be contended, that they are not bound to carry packed parcels; for their published regulations as to them are simply nugatory, inasmuch as they are found to have carried for others, and must carry for the plaintiff also: *Parker v. Great Western Railway Company*(f). Lastly, the fifty-seventh plea is bad. Assuming it to have been proved, it sets up a right in a carrier on all occasions to have the contents of a parcel disclosed to him. If there were any such general right, the provisions of the 8 & 9 Vict. c. 20, s. 105, giving this right in particular cases, would have been unnecessary; and such a general right is clearly unreasonable, as incompatible with the transaction of business. Probably, the dictum of *Best*, C. J., in *Riley v. Horne*(g), that "a carrier has a right to know the value and quality of what he is required to carry," may be cited by the other side: but that cannot be meant as a general proposition; or, if it is, the decided cases do not support it. But, moreover, the plea was not proved. It is expressly found by the case, that the reason of the defendants' refusal to carry was, that the parcel was a packed parcel, and not that they did not know its contents. Nor was this assigned as the reason at the time; they cannot therefore now avail themselves of it: *White v. Gainer*(h),

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(a) 12 Mod. 484.

(b) 4 Exch. 372.

(c) 8 M. & W. 421.

(d) 8 Exch. 341.

(e) 15 Jur. 448.

(f) 7 M. & Gr. 253; and see also 11 C. B. 545.

(g) 5 Bing. 222.

(h) 2 Bing. 23.

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Atherton (*Bovill* with him) for liability to render services for an; them is an exception to the law general, and is confined to inn *Elses v. Gatward (c), Muspratt v. G* ligation cast on the carrier by the be co-extensive, and no more, with as an insurer: and if it be unrea carrier to a foreign country should insurer, it follows that he cannot b against his will all goods tender foreign country. In the one case, has the protection of the English l reasonable that he should be liabl has such protection, but the rea without that protection. All the liability of a carrier for loss are ca to places within the realm. *Morse* though cited as a conclusive auth The loss there occurred within the Thames, as appears from the citat Ab. tit. "Carrier," B.; and this is ment in 1 Vent. 190, and in the ju Vent. 238. There it is said—"This sured by the rules of the admiralty was *infra corpus comitatûs*, within county." Molloy, *De Jure Maritin* this case of *Morse v. Slus* at length "if the fault be committed in any creek, or any other place which is

(a) 9 M. & W. 675.

(c)

(b) 10 M. & W. 399.

(d)

the common law shall have jurisdiction, and not the admiralty." And, in *Lane v. Cotton*, Holt, C. J., makes a still stronger observation—"In *Morse v. Slue*, if the ship had been robbed at sea, the master had not been answerable, yet he was chargeable *at land*." As far as it goes, therefore, that case is rather in favour of the defendants. When are the defendants carriers beyond their own line? [*Jervis*, C. J.—The facts found are clearly against you to this. The van is locked in London, and goes rough without being opened.] The measure of the defendants' liability is their *profession*; and, at all events, the facts shew that they did not profess to be carriers of packed parcels beyond their own line; for they publish a notice expressly that they will not carry such parcels beyond Rugby. [*Jervis*, C. J.—Their profession is to carry packed parcels, for their practice is to carry for ninety-nine persons and refuse the hundredth.] Lastly, as to the twenty-seventh plea. It was not necessary for the defendants to prove that the reason alleged in their plea was the reason on which they acted; it is sufficient if they shew that the ground alleged existed to their knowledge at the time of the refusal: *Spotswood v. Barrow*(a), *Ridgway v. Hunsford Market Company*(b), *Baillie v. Kell*(c), *Cussons v. Munn*(d). Here, was the ground alleged and proved, viz. the non-disclosure of the contents of the parcel, a justifiable cause of refusal? It is submitted, that it was: *Wiley v. Horne*(e). In the judgment in that case, at p. 224, it is expressly laid down, that "a carrier is not obliged to open a package, the owner of which will not inform him what are its contents, and of what value they are." See also Bac. Abr. "Carrier," B., and Story on Bailments, pp. 54—568, last edit.

J. Brown, in reply, cited *Wyld v. Pickford*(f).

(a) 5 Exch. 110.

(b) 3 Ad. & E. 171.

(c) 4 Bing. N. C. 638.

(d) 11 M. & W. 161.

(e) 5 Bing. 217.

(f) 8 M. & W. 443.

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JERVIS, C. J.—I am of opinion that the plaintiff is entitled to our judgment. The effect of the 86th, 87th, and 89th sections of the Railways Clauses Consolidation Act, 1845, is to put this Company, the defendants, on the footing of common carriers; and the question is, whether they are liable as such carriers in the present action. First, I think that they are liable on the first count of the declaration. I think that the defendants, holding themselves out as common carriers in England, and professing in that character of common carriers to carry from London to Glasgow, are liable for refusing to accept goods to be carried from the one terminus to the other. It is not now denied, although the authorities on the subject are not numerous, that, if a carrier holds himself out as a common carrier from London to some other place in England, such as Oxford, he is bound to carry all goods within reasonable limits, that may be tendered to him to be carried from London to Oxford. And the only question for us to decide on this first count is, whether this rule of law applies to a case where the terminus ad quem is out of England. I think it does. A person, who holds himself out as a common carrier, ordinarily subjects himself to two liabilities: first, if he accepts goods to be carried, by the common law of England (that is, by the law founded on the custom of the realm,) there is engrafted on the mere acceptance of the goods a certain contract, which is, that he shall safely carry the goods, and be answerable for them as an insurer, with the exception of the act of God and the queen's enemies; that is, if he accept the goods: and it was admitted, in the course of the argument, and indeed could not have been denied, that, if these defendants had accepted the goods in London, the common law would have engrafted on that contract to carry them to Glasgow an obligation to carry them subject to the liability already stated. The case of *Morse v. Slue* seems to be an authority to that extent; and the circumstances of

that case seem to put the matter beyond doubt. Now, if, as it is admitted, from their holding themselves out as common carriers, on the acceptance of the goods, the common law will engraft the liability, that they are to carry safely, even if they are to carry them beyond the realm, it would seem, that, if they openly profess to be carriers, they take upon themselves the other part of the common law liability, which is, that they must accept, within reasonable limits, all goods that may be tendered to them to carry. It therefore follows, if, being carriers within the realm, they are bound to take the goods which are offered to them to be carried in the realm, that, professing and holding themselves out to be carriers beyond the realm, being themselves within the realm at the time of such profession, they are equally bound to accept and carry goods beyond the realm on the terms on which they are professing to contract. Therefore, I am clearly of opinion, that the first count is good, charging, as it does, the defendants with that liability; and that the defendants are liable for a breach of the duty laid upon them by reason of their holding themselves out as common carriers, by professing to carry goods for all persons to Glasgow.

With respect to the second point, which arises on the seventh count, that the defendants are not carriers to Sheffield, or, at any rate, not of packed parcels, that is disposed of by the evidence. Their practice is stated to have been as follows:—they carry in every case packed parcels, except in this particular case. Although it is true, that this liability rests on the professions that they hold out, and although it is found in this case that they have given certain directions to their servants with respect to packed parcels (notice of which they had given to the plaintiff), that they would only carry them to the terminus of their own line, yet those directions are contradicted by their uniform course of conduct and their practice with regard to the rest of the world. They do, in fact, carry

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to Sheffield; and the law will be
"We will carry for ninety-nine our
field, and for the hundredth we will
because it is a packed parcel." This
by reason of their being common carriers
the same course of dealing with regard
found in this case that it was their
parcels for every one but the present
administer the same measure of
the rest of the world.

With respect to the third point
the fifty-seventh plea, it seems to
bad. No authority has been cited
is entitled to inquire and know the
the goods which are tendered to him
there seems to me, on looking at
of the statute respecting the carriers
reason why this inquiry should be
Parliament (8 Vict. c. 20, s. 105) pro
dangerous articles, that the Railway
entitled to know if a package contains
contents of such packages must be disclosed
delivery; and if the Company should
contain articles of a dangerous nature
to have them opened. With respect
value, or of a perishable nature, the
a similar protection to the carrier
such goods is not disclosed at the time
the carrier, and payment made accordingly
rate, in the nature, as it were, of an
of the carrier is limited by reason of
the consignee cannot recover the
damage. The carrier, therefore, is
in these respects. But, even if it is
circumstances be reasonable that the
formed of the contents of a parcel,
stated in the plea that there was

sion for asking for the information. It is not alleged in the plea that it was reasonable to require the information. The plea is founded on the general proposition extending to all goods, of whatever nature and quality, that, where a parcel is sent to a common carrier, the party who delivers it is bound to know the nature and quality of the contents, and, if asked, to be able to state what they are. Now, this proposition would, if true, be so highly inconvenient, as it seems to me, in its consequences as to require authority to support it. I think, therefore, that the plea is not a good plea. It is unnecessary to express a decided opinion whether the plea was proved or not, as the plea is bad.

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MAULE, J.—I am of the same opinion that our judgment ought to be for the plaintiff. First, as to the main contention, the defendants are charged as common carriers from London to Glasgow, the terminus of the journey not being in England; and it is said, that this is an action founded on the custom of England, and that that is not applicable and cannot extend to the carrying from a place in England to a place out of England. But there is no authority to support this proposition. The case of *Morse v. Slue* seems to be against it. That case, however, is not exactly similar to this. In that case the goods were accepted; this is a case of refusal to take goods. It is considered as law, that a common carrier is liable to an action if he refuse to take goods of a class which he is in the habit of taking, without some special reason for refusing the goods of any one who desires him to take them. That being the general law, I do not see why it should not apply to a case where one of the termini of the carriage is out of the realm; and no authority has been cited to shew that it does not. The case of *Morse v. Slue* shews, so far as one of the liabilities that are by the common law thrown on a common carrier, viz. the liability to take care

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of the goods, is concerned, that that liability as a common carrier extends to a person whose voyage is beyond the seas. Mr. *Atherton* has attempted to shew that it is unreasonable that this liability should extend so far; because, as he says, if a carrier to Glasgow, which is a place beyond the realm, is liable as a common carrier for not receiving goods, he must also be liable as an insurer of the goods if they are lost or damaged out of the realm, just as much as if they were lost or damaged in the realm. His argument is this:—A common carrier is liable to an action for refusing to receive goods; a common carrier is liable as an insurer for not safely delivering the goods. Therefore, a man who is not liable for not delivering goods is not a common carrier, and, therefore, is not liable to an action for not receiving goods. Now, I deny, that a man who is not an insurer of goods is therefore not a common carrier. A common carrier, who makes no stipulation, and gives no notice with respect to the insurance of goods, is, no doubt, liable as an insurer of the goods; but a common carrier, who, by notice, limits his liability, and says, “I will not contract as an insurer,” or “I will only contract to such and such an extent,” or “to such and such a value,” still remains in all other respects a common carrier; and even in that respect he is a common carrier, because, although the incident of being an insurer does not apply to him, that is only because it is specially provided for. In every day’s experience that is so. Therefore, that does away with the argument as to the hardship, which is suggested. It may be said, that crossing the border is a dangerous thing, and that a man would not be willing to be an insurer after crossing the border, as he would in quiet English counties. The answer is, suppose that is so, the carrier has nothing to do but to say, “I won’t be liable for loss or thefts taking place across the border in Scotland;” but, if he does not choose to give this notice, (which there is no pretence that the defendants do

re), then he is liable for the whole risk; and it is because he means to have his competent reward for that risk as well as payment for the rest of the journey. That is the main argument of Mr. *Atherton*, and it is answered in that way, as it seems to me, in a substantial manner. The defendants are common carriers to the full extent of any other common carrier's liability, and are bound to receive goods which are tendered to them, for which they have convenience and room.

As to the second point, there can be no doubt that the facts disclosed shew, that the defendants were carriers from London to Sheffield, and not to Rugby only. They held themselves out as carriers from London to Sheffield; and it is a common thing for people in this sort of business to employ other persons to do part of their carrying.

Then, thirdly, I apprehend that the defendants have no right to object to a parcel because it is a packed parcel. They themselves seem to have had misgivings about that; and when they learnt that the parcel was packed, they went further, and inquired what were the contents of each small parcel, knowing very well that the person of whom that question was asked could not give them the information. Mr. *Atherton* says, "I contend that the defendants were not carriers to Sheffield at all, and particularly not carriers of packed parcels." If Mr. *Atherton* could succeed on the former point, it would be all well and good; but I think he would have much less chance of making out a distinction between a carrier of packed parcels and a carrier who is not a carrier of packed parcels; and he has certainly touched this question, whether or not a carrier is bound to carry packed parcels, with great delicacy. The main question of whether the defendants are common carriers, and subject to the law applicable to such if they carry beyond the realm, has been fully argued; and the question as to how far they are entitled to information has been answered fully. But, it seems to me to be

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a difficult proposition to maintain, if identically the same goods are offered by two parties, there being no difference between the packages, except that in the one case the goods are *packed*, (that is to say, the several parcels belong to several different persons, to whom they are sent and addressed), and in the other they belong to one person, that this circumstance makes any difference. I think, therefore, this question is decided in favour of the plaintiff by the evidence, which shews that the defendants were carriers to Sheffield.

Lastly, with respect to the fifty-seventh plea—In considering the goodness of this plea, issue having been joined upon it, I conceive that the allegation, that “because the defendants did not know the contents of the parcel,” must be taken as an allegation that they did not know the contents, and that they refused to carry for that cause. They say, “we refused to carry the parcel because we did not know the contents, and let that be taken as the cause of our refusal.” That is how I understand the plea, and that view is favourable to the defendants so far. But then, in order to sustain this plea, as Mr. *Brown* has pointed out, you must hold that in all cases whatever the carrier has a right to ask the person who brings a parcel what its contents are, and that if he is not informed of them he may refuse to carry it. There is no authority to support such a proposition. There are, it is true, some dicta of *Best*, C. J.; but I conceive that there is not the shadow of what may be called an authority on the subject; and it is a proposition which is untenable in its generality or rather universality, seeing the extent of inconvenience to which it would necessarily lead if this plea were held good. I think that this plea, in order to be good, ought to have alleged some ground why the defendants made that inquiry. If they do not suggest any, it must be taken that they had no special ground. Now, there is no doubt, that, if there had been any improper package sent by the plaintiff, the defend-

ants would not be liable; or, if there had been any deception on the part of the plaintiff as to the value, the defendants may not be liable for damage. The defendants are competent to limit, and do limit by their notice, their liability with respect to certain valuable commodities; and with respect to dangerous articles there is also provision made, that, whenever there is good reason to suspect a parcel to contain such, they may insist on being informed of the nature of the contents; and, if the information is withheld, they may say "then we must open it ourselves, or we will not take it." But, as for saying that in all cases the carrier may require the person bringing the parcel to give him a full description of every article in it, it is an untenable proposition: and the plea which sets out this ground only of refusal is invalid in law. Therefore, upon the whole, I think that the plaintiff is entitled to judgment.

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CRESSWELL, J.—I am of the same opinion. And, first, with respect to the question whether the defendants are carriers from London to Glasgow and from London to Sheffield. The evidence clearly shews that they were. They dispatched the goods in a van of their own; it is locked up, the key remaining in London; nobody has access to it except their agent at the other terminus of the journey; and all that is done in the meantime is, that certain locomotive power is found by other persons to convey it. I think, therefore, that there is no doubt that the defendants are, in fact, carriers from London to Glasgow and from London to Sheffield. Then it is said, that they cannot be common carriers, at all events, from London to Glasgow, because a part of that distance is out of the realm of England. But, I apprehend, that there can be as little doubt that they may be common carriers out of the realm as in it. Now, a common carrier is a person who, in the language of Lord *Holt* in *Coggs v. Bernard*,

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“exercises a public employment;” he professes to carry for all persons from one place to another. In that there are two ingredients, one that he is to take in goods for all persons alike; and the other, that he must be subject, in the absence of any special contract, to a contract imposed by the law on common carriers—namely, that they shall be insurers, with the exception of loss by the act of God and the king’s enemies. In *Morse v. Slue*, it was decided, that, although the contract was to convey from this country to another, yet that latter liability attendant on common carriers would attach in the absence of any special contract; and, if that incident attaches, why should not the other—namely, that a person being a common carrier, although part of the profit is derived out of the realm, shall yet be compellable to take goods from one place to another, provided he has room for them in his vehicle? That being so, what is the defendants’ reason for refusal? This brings us to the plea: that is—that the plaintiff did not give them information in answer to their inquiry as to the contents of the packed parcel; they not assigning any reason, and there being nothing to shew that it was a reasonable request, or that the information was necessary for the purpose of their business. This plea is much too large, assuming, as it does, that the defendants have a right to the information required, under all circumstances; consequently I think the plea is bad.

WILLIAMS, J.—I am of the same opinion. The first point is on the record, and raises the question whether an action for refusing to carry goods lies against a person who holds himself out as a common carrier, notwithstanding one of the termini be out of the realm of England. I am of opinion that it does. It is said, that *Morse v. Slue* does not decide this point, because it appears that there the loss, which was the subject of the action, took place within the body of an English county. That case is

reported in a very unsatisfactory manner. But supposing the case were altogether to be decided on principle, it would seem to be inconvenient and unjust, were we to hold that the common law liability did not attach in a case where the carrier had actually received the goods, indeed so unjust that it would be impossible to hold that it did not. And, in the present case, were we to hold otherwise than we do, it would be introducing an anomaly for which there is no reason. Upon the second point, which is, that the defendants cannot be considered as common carriers beyond the limits of their own railway:—They held themselves out as carriers from London to Sheffield and Glasgow, and they are common carriers from London to Sheffield and Glasgow, whether by means of their own railway, or by the agency of the railway of another Company. With respect to the third point, whether the fifty-seventh plea is good or not:—I think that it is bad in the general form in which it has been framed; it cannot be good unless the law says, that, under all circumstances, carriers have a right to demand and to know the contents of a parcel; and that, upon a refusal to give the information, under whatever circumstances that refusal may have taken place, they may decline to carry the parcel. The law is not so. I think, therefore, that the plaintiff is entitled to our judgment.

Judgment for the plaintiff.

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*Easter and Trinity Terms, 1853.**May 2nd &
27th;
July 6th.*THE SOUTH YORKSHIRE RAILWAY AND RIVER DUN COMPANY
v. THE GREAT NORTHERN RAILWAY COMPANY.

The plaintiffs
and defendants,
two Railway
Companies, ex-
ecuted a bona
fide agreement
by deed, which
(after reciting
that the plain-
tiffs' lines in-
tersected a cer-
tain coal-field,
and formed the
means by which
the produce
of such coal-
field might
be transport-

DECLARATION, that, by a deed, bearing date the 26th of February, 1852, made between the plaintiffs, then being the owners of certain railways, of the one part, and the defendants, then being the owners of certain other railways, of the other part, and sealed with their respective seals, it was mutually agreed, that the defendants might, during the term of twenty-one years, to be computed from the 1st of July, 1851, pass, go, and remain, and have full and free ingress, egress, and regress into, over, upon, and out of the railways of the plaintiffs, and

ed to distant places for consumption; that, the defendants' lines communicating with the lines of the plaintiffs, the defendants were desirous of making arrangements for the passage of their engines and carriages over the lines of the plaintiffs, for the purpose of carrying coal, upon payment of a graduated toll in proportion to the quantity carried; that, the carriage of coal forming an important branch of the plaintiffs' revenue, they were apprehensive that such arrangements might injuriously affect both their coal and general traffic, and had declined to accede to them, unless they should be guaranteed from injury therefrom; and that the two Companies, being unable to determine upon any fixed rate of toll by which that result could be secured, had agreed to enter into the contract contained in the deed, for tolls fluctuating as thereafter mentioned:) provided, first, that the defendants might, for twenty-one years, pass over the plaintiffs' lines, and have free use of their works and conveniences, engines, waggons, &c., for the purpose of carrying coal. Secondly, that such passage should be on payment of the tolls and on such conditions as thereafter mentioned; that is to say, when, during any period of six months commencing on a given day, less than 125,000 tons of coal should be carried, the defendants should pay to the plaintiffs such a toll as would, with any clear profit made by the plaintiffs for the same period, be sufficient to enable the plaintiffs to pay the dividends for such six months on their guaranteed or preference shares, and a dividend at the rate of 3l. per cent. per annum for such six months on the calls paid up on their ordinary shares; when more than 125,000 tons and less than 150,000 were carried, such sum as would make up, in like manner, the dividends on the preference stock, and 3l. 5s. on the ordinary stock, and so on progressively, by advances of 25,000 tons up to the carriage of upwards of 400,000 tons, when the defendants were to pay the plaintiffs such sum as, together with the clear profits made by the plaintiffs, would pay the dividends upon the preference stock, and 6l. upon the ordinary stock. And there was then a proviso, that, if the payment by the defendants, for any six months, made up 4l. 10s. per cent. on the ordinary stock of the plaintiffs, the toll should never fall below the sum which would enable the plaintiffs to pay that dividend:—*Held*, (by a majority of the Court of Exchequer, and affirmed in error), in an action upon the deed for toll for the use of the plaintiffs' line, that the contract was legal, as being one which the Companies were competent to make and not ultra vires, the payments to be made under it being within the meaning of the word "toll" in the 87th sect. of the Railways Clauses Consolidation Act, 1845, (8 Vict. c. 20).

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have the free use of all the works and conveniences of the plaintiffs, with all engines, waggon, or other carriages, officers, servants, and workmen necessary for the purpose of carrying coal; and that such passage of the defendants over or along the said railways of the plaintiffs, and such use of their works and conveniences, should be had on payment of such tolls, and under such restrictions and conditions, as were and are in the said deed specified. Averments, that, during six calendar months, terminating on the 30th of June, 1852, the defendants had and enjoyed such passage as aforesaid over and along the said railways of the plaintiffs, and also had and enjoyed the use of the said works and conveniences of the plaintiffs, to wit, for the purpose aforesaid; and that a large amount of toll became due and payable to the plaintiffs in respect thereof, to wit, under and by virtue of the covenants and agreements of the defendants in that behalf in the said deed contained. Breach, that, although the time for payment of the toll has elapsed, and although all things necessary to be done to entitle the plaintiffs to be paid were duly done, yet the defendants have not paid the toll.

The plea set out the deed, of which the following are the material parts:—This indenture, made the 26th of February, 1852, between the South Yorkshire Railway and River Dun Company, of the one part, and the Great Northern Railway Company, of the other part: whereas the lines and branch lines of railway, forming part of the undertaking of the South Yorkshire Railway and River Dun Company, intersect or penetrate into the South Yorkshire coal-field, between the towns of Barnsley and Penistone on the one side, and Sheffield, Rotherham, and Swinton on the other side, and form the means by which the coal, the produce of such coal-field, may be transported to distant places for consumption; and whereas the Great Northern Company's railway communicates with the railways of the South

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Yorkshire Railway and River Dun Company by a junction or junctions at or near Doncaster, in the county of York; and whereas certain agreements and arrangements have been made between the said Companies for working each other's lines; and the Great Northern Railway Company, being desirous to make further arrangements, as hereinafter specified, for the passage over the railways of the South Yorkshire Railway and River Dun Company of the engines, waggons, and other carriages of the Great Northern Railway Company, for the purpose of carrying coal, upon payment of a graduated toll in proportion to the quantity of coal so carried, applied to the South Yorkshire Railway and River Dun Company, and requested them to enter into such further arrangements; but the South Yorkshire Railway and River Dun Company, whose railways and canals are largely used for the carriage of coal, which forms an important branch of their revenue, being apprehensive that such arrangements for passage of the engines, waggons, and other carriages of the Great Northern Railway Company upon and over the railways of the South Yorkshire Railway and River Dun Company, might injuriously affect both the coal traffic and general traffic of such Company, declined to accede to such request, unless they should be guaranteed from any injury, present or future, therefrom; and the said Companies, being unable to determine upon any fixed rate of toll by which that result could be secured, have agreed to enter into the contract hereby made for the passage over and along the railways of the South Yorkshire Railway and River Dun Company of the engines, waggons, and other carriages of the Great Northern Railway Company for the purpose of coal traffic, on payment of such fluctuating tolls as hereinafter mentioned: Now this indenture witnesseth, that the South Yorkshire Railway and River Dun Company, for themselves, their successors, and assigns, and the Great Northern Railway Company, for

themselves, their successors, and assigns, do hereby mutually covenant and agree in manner following, that is to say,

First. That the Great Northern Railway Company shall and may at all times hereafter, during the term of twenty-one years, to commence and be computed from the 1st of July, 1851, pass, go, and remain, and have full and free ingress, egress, and regress into, over, upon, and out of the railways, and have the free use of all the works and conveniences of the South Yorkshire Railway and River Dun Company, and every or any part thereof, with all engines, waggons, or other carriages, officers, servants, and workmen necessary for the purpose of carrying coal.

Secondly. That such passage of the Great Northern Railway Company over or along the railways of the South Yorkshire Railway and River Dun Company, and the use of their works and conveniences, shall be had and made on payment of such tolls, and under such restrictions and conditions as are hereinafter specified, and which have been mutually agreed upon between the said Companies; (that is to say), when and so long as the quantity of coal carried over or upon the said undertaking of the South Yorkshire Railway and River Dun Company, or any part thereof, to the Great Northern Railway, and thence south of Doncaster on the main line, or south of Misterton on the loop line of the Great Northern Railway, together with the quantity of coal carried over or upon the said undertaking, or any part thereof, by or for the Great Northern Railway Company, or by or for any corporation or person, under or by virtue of any arrangement or agreement with or by permission of the Great Northern Railway Company, to any railway other than the Great Northern Railway, for transit to the south of Sheffield or Rotherham, shall not amount to 125,000 tons in any period of six calendar months, commencing upon and with any 1st day of July or 1st day of January, and terminating upon and with any 31st day of Decem-

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ber or 30th day of June, during the continuance of the said term of twenty-one years, and the first of such period to commence with the 1st day of July, 1851, then the Great Northern Railway Company shall pay to the South Yorkshire Railway and River Dun Company such toll for such passage, for such period of six calendar months, as will, with any clear profits which may be made by the South Yorkshire Railway and River Dun Company from their undertaking for the same period, after payment of all annual or half-yearly charges for interest or other outgoings, and all expenses of management and otherwise, be sufficient to enable the South Yorkshire Railway and River Dun Company to pay such dividends as may, at any time during the period of six calendar months, be or become payable upon or in respect of any guaranteed or preference stock or shares of such last-named Company already issued, or hereafter to be issued with the knowledge and consent of the Great Northern Railway Company; and also a clear net dividend, at the rate of 3½ per cent. per annum, for such period of six calendar months upon the ordinary capital stock or shares for the time being of such South Yorkshire Railway and River Dun Company now called up, or hereafter to be called up with the consent of the Great Northern Railway Company; and when and so long as the quantity of coal so carried in any such period of six calendar months as aforesaid shall amount to any of the respective quantities hereinafter mentioned, and shall not amount to the quantity next succeeding such quantity in the order hereinafter contained, then the said Great Northern Railway Company shall pay to the South Yorkshire Railway and River Dun Company such toll for such passage, for such period of six calendar months, as will, with any such clear profits as aforesaid, be sufficient to enable the South Yorkshire Railway and River Dun Company, from time to time and at all times, to pay any dividends which may

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the time being become payable upon or in respect of such guaranteed or preference stock or shares of such mentioned Company as aforesaid; and also a clear net dividend on such ordinary capital stock or shares for the being of such Company as aforesaid, at the respective rates hereinafter mentioned; (that is to say), when so long as the quantity of coal so carried in any such period of six calendar months shall amount to 125,000 tons, and shall not amount to 150,000 tons, a clear net dividend upon such ordinary capital stock or shares, at the rate of 3*l*. 5*s*. per cent. per annum, for such period of six calendar months; and when and so long as the quantity of coal so carried in any such period of six calendar months shall amount to 150,000 tons, and shall not amount to 175,000 tons, a clear net dividend upon such ordinary capital stock or shares, at the rate of 3*l*. 10*s*. per cent. per annum, for such period of six calendar months,

(The deed proceeded in this way to stipulate for an addition of 5*s*. to the six months dividend for every additional 25,000 tons carried, until the quantity amounted to 400,000 tons); and when and so long as the quantity of coal so carried in any such period of six calendar months shall amount to 400,000 tons or upwards, a clear dividend upon such ordinary capital stock or shares, at the rate of 6*l*. per cent. per annum, for such period of six calendar months: Provided always, that, whenever the quantity of coals so carried in any such period of six calendar months, together with any quantity brought forward to and reckoned in that period in pursuance of that proviso, shall be a quantity which is not an exact multiple of 25,000 tons, the difference between the total of the quantity and the sum of the highest multiple of 25,000 tons contained therein shall be carried on and added and reckoned in the quantity of coal regulating the rate of toll for the next succeeding period of six calendar months: Provided nevertheless, that, when once the Great Northern Railway Company shall have become

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liable to pay to the South Yorkshire Railway and River
 Dun Company such toll for such passage as aforesaid, for
 any such period of six calendar months as aforesaid, as
 will, with any such clear profits and after payment of
 such expenses as aforesaid, be sufficient to enable the
 last-named Company to pay such dividends upon guaran-
 teed or preference stock of such last-named Company as
 aforesaid and a net dividend upon the ordinary capital
 stock or shares of such last-named Company, not exceed-
 ing the rate of £ 10s. per cent. per annum for any such
 period of six calendar months, then and from thence-
 forth the toll to be paid by the Great Northern Railway
 Company to the South Yorkshire Railway and River Dun
 Company for such passage as aforesaid shall never, under
 any circumstances, recede nor be less, for any subsequent
 period of six calendar months as aforesaid, than such toll
 as will, with any such clear profits and after payment of
 such expenses as aforesaid, be sufficient to enable the
 South Yorkshire Railway and River Dun Company to
 pay such dividends upon guaranteed or preference stock
 as aforesaid, and also a net dividend upon the ordinary
 capital stock or shares of such last-named Company, after
 the highest rate of such last-mentioned dividend, not ex-
 ceeding the rate of £ 10s. per cent. per annum for any
 period of six calendar months which the Great Northern
 Railway Company shall have theretofore become liable to
 pay to the South Yorkshire Railway and River Dun
 Company by virtue of these presents, notwithstanding
 the diminution to any extent in any succeeding period of
 six calendar months of the quantity of coals regulating
 the toll to be paid as aforesaid.

Averment, that the deed was not a deed authorised by
 the statutes then in force relating to the said Great North-
 ern Railway Company, or any of them, and was and is
 therefore void.

Demurrer.

The case was argued (May 2nd and 27th) by Sir F.

Kelly for the plaintiffs (*Hugh Hill* and *Manisty* with him). He cited the Railways Clauses Consolidation Act, 1845, 8 Vict. c. 20, ss. 3 and 87, and the plaintiffs' special Act, 10 & 11 Vict. c. ccxci. ss. 45 and 52, *Simpson v. Denison*(a), *Great Northern Railway Company v. Manchester, Sheffield, and Lincolnshire Railway Company*(b), and *Hawkes v. Eastern Counties Railway Company*(c).

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Bramwell (*Knowles* and *Cowling* with him) for the defendants.—He cited *East Anglian Railway Company v. Eastern Counties Railway Company*(d), *Gage v. Newmarket Railway Company*(e), *M'Gregor v. The Official Manager of the Deal and Dover Railway Company*(f), and the 8 Vict. c. 20, s. 86, and 8 Vict. c. 16, s. 65.

Cur. adv. vult.

The Judges, differing in opinion, delivered their judgments seriatim, July 6th.

MARTIN, B.—This is a demurrer to a plea. The declaration alleges, that, by a deed dated the 26th December, 1852, sealed with the respective seals of the plaintiffs and the defendants, it was agreed that the defendants might, for a term of twenty-one years from the 1st of July, 1851, pass and go over the railways of the plaintiffs, and have the free use of all their works and conveniences, with engines and waggons, for the purpose of conveying coal, on payment of certain tolls, and under such restrictions and conditions as were specified in the deed; and the plaintiffs aver, that, during six calendar months, ending on the 30th of June, 1852, the defendants had enjoyed such passage and the use of the plaintiffs' works and conve-

(a) Ante, p. 403; 16 Jur. 830; 10 Hare, 51.

(b) 5 De G. & S. 138.

(c) Ante, p. 188; 1 De G., Mac. & G. 737.

(d) Ante, p. 150; 11 C. B. 775.

(e) Ante, p. 168; 21 L. J., Q. B., 398.

(f) Ante, p. 227; 22 L. J., Q. B., 69.

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niences; and that a large amount of toll had become due and payable in respect thereof by virtue of the provisions of the deed; nevertheless, the defendants had not paid the entire sum due.

The defendants in their plea set out the deed at length, and then averred, that it was not authorised by the Acts of Parliament in force relating to the defendants. To this plea there was a demurrer.

From the above statement of the pleadings, it is obvious, that, for the purpose of the present judgment, the deed in question must be deemed to be a perfectly honest deed, and to represent fairly and bonâ fide the contract between the parties, and that no intendment whatever is to be made against it; and that the sole question is, whether or not the contract contained in it is absolutely void, and one which it was contrary to law for the defendants to enter into.

The deed begins by reciting, that the plaintiffs' railways intersect the South Yorkshire coal-field, and that the defendants' railway communicates with it near Doncaster; that certain agreements had been made between the two Companies for working each other's lines; and that the defendants, being desirous to make other arrangements for the passage of their engines and waggons over the railways of the plaintiffs for the purpose of carrying coal, upon payment of a graduated toll in proportion to the quantity of coal carried, had applied to and requested the plaintiffs to enter into further arrangements; but the plaintiffs, whose railways were largely used for the carriage of coal, which formed an important branch of their revenues, being apprehensive that such arrangement might injuriously affect their coal traffic and general traffic, had declined to accede to such request, unless they should be guaranteed from any injury, present or future, therefrom; and that the Company, being unable to determine upon any fixed rate of toll by which that result could be secured, had agreed to enter into the contract contained in the deed

for the passage over the plaintiffs' railways of the engines and waggons of the defendants, for the purpose of coal traffic, on payment of the fluctuating toll thereafter mentioned. The deed then proceeds to provide, first, that the defendants might, for twenty-one years, from the 1st of July, 1851, pass over the railways of the plaintiffs, and have free use of their works and conveniences, with engines and waggons, for the purpose of carrying coal. Secondly, that such passage should be had and made on payment of the tolls and under such restrictions and conditions as were thereafter mentioned; that is to say, when the quantity of coal carried over any part of the plaintiffs' railways to the defendants' railways, and thence south of Doncaster, together with the quantity of coal carried over the plaintiffs' railways by or for the defendants, or by or for any corporation or person, or by virtue of any arrangement with or by permission of the defendants to any other railway, for transit to the south of Sheffield or Rotherham, should not amount to 125,000 tons in the period of six calendar months, commencing upon the 1st day of July or 1st day of January, and ending on the 31st of December or 30th of June, during the said term of twenty-one years, then the defendants would pay to the plaintiffs such toll for such passage for such period of six calendar months, as would, with any clear profit which might be made by the plaintiffs for the same period, after payment of all annual and half-yearly charges for interest and outgoings and all expenses of management or otherwise, be sufficient to enable the plaintiffs to pay such dividends as might become payable in respect of any guaranteed or preference stock of the plaintiffs already issued, or hereafter to be issued with the consent of the defendants; and also a clear net dividend, at the rate of 3½ per cent. per annum, for such period of six calendar months, upon the ordinary capital stock for the time being of the plaintiffs then called up, or thereafter to be called

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up with the consent of the defendants; and when the quantity of coal for any such period of six calendar months should exceed 125,000 tons and not 150,000 tons, such sum as would make up in manner as before mentioned the dividend upon the preference stock, and 3*l.* 5*s.* per cent. upon the ordinary stock; and when the quantity of coal, during the like period of six calendar months, should exceed 150,000 tons and not 175,000 tons, such sum as would make up in the like manner the dividend upon the preference stock, and 3*l.* 10*s.* per cent. on the ordinary stock; and so on progressively up to the carriage of upwards of 400,000 tons during any such period of six calendar months, in which case the defendants were to pay the plaintiffs such sum as, together with the clear profits made by the plaintiffs during the same period, would pay the dividends upon the preference stock and 6*l.* per cent. upon the ordinary stock. The second article then went on to provide some other matters with respect to the calculations of the number of tons; and that, if the payment made by the defendants for any period of six months once made up 4*l.* 10*s.* per cent. on the ordinary stock of the plaintiffs, it should never afterwards recede.

There were a variety of other articles and provisions, which do not seem necessary to be stated, because they are all fairly directed to carry out the above arrangement, and are of themselves unobjectionable.

The question argued before us was, whether the contract above stated is unlawful; and I am of opinion that it is.

The learned counsel for the defendants relied upon two cases: *The East Anglian Railway Company v. The Eastern Counties Railway Company* (a), and *M'Gregor v. The Official Manager of the Deal and Dover Railway Company* (in the Exchequer Chamber, on a writ of error from the Queen's Bench) (b). In the former case, the defendants had en-

(a) Ante, p. 150; 11 C. B. 775. (b) Ante, p. 227; 22 L. J., Q. B. 69.

ered into a contract by deed with the plaintiffs to take a lease of their railway, and pay the costs of certain bills then pending in Parliament. It was objected by the defendants, that this (their own deed) was illegal, because the monies raised and earned by the defendants were exclusively appropriated by the legislature to certain specified objects—namely, to make and maintain their own railway, and to carry their Acts into execution; and that afterwards their profits were to be divided amongst their own shareholders. The Court of Common Pleas were of this opinion; and the Lord Chief Justice, in delivering the judgment of the Court, entirely adopted the view which had been enunciated by several Judges in the Courts of equity, viz. that the Railway Companies are bound to apply all their monies and property for the purposes directed and provided for by their Acts, and for no other purpose whatever; and that the shareholders have a right to have the profits of the Company applied in the manner directed by the legislature; and that neither the property nor the profits of the Company can be lawfully applied to any other purpose or object, however probable it might be that such purpose or object would turn out most beneficial to the Company; and the Court decided, that the contract then in question was beyond the scope of the defendants' authority as a corporation, and was illegal and void, and that the defendants could avail themselves of such illegality. The principle of this judgment was fully recognised and adopted by the Court of Exchequer Chamber in the other case before mentioned; and whatever, perhaps not unreasonable, doubt might have originally existed as to the propriety of the principle, these cases must be taken to govern all the Courts in Westminster Hall. It is unnecessary to state here the various clauses in the Acts relating to the defendants' Company, which correspond with the clauses in the Eastern Counties Company's Acts, relied upon in the case in the Court

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of Common Pleas, as the learned counsel for the plaintiffs admitted that they in substance agreed; but he relied upon the 87th section of the 8 Vict. c. 20 (the Railways Clauses Consolidation Act, 1845), as rendering the present contract valid.

By this section it is enacted, that it shall be lawful for a railway company to enter into a contract with any other railway company for the passage over the lines of the latter of any engines and waggons, upon the payment of such tolls, and under such conditions and restrictions as may be mutually agreed on; and it is provided, that, for this purpose, it shall be lawful for the parties to enter into any contract for the division or apportionment of the tolls to be taken upon the respective railways. By section 3 (the interpretation clause), "toll" is declared to include "any rate or charge, or other payment, payable under the special Act, for any passenger, animal, carriage, goods, merchandise, articles, matters, or things conveyed on the railway." I agree with the learned counsel for the plaintiffs, that the real question is, whether the present contract falls within the above sections, or, in other words, whether the payments contracted to be made by the defendants to the plaintiffs are "tolls" within their true meaning. It was argued, that it was only necessary, at the end of every six months, to divide the sum required to be paid to the plaintiffs by the number of tons of coal carried, and that the result would give the toll. It is clear, that, for any quantity of coal carried between one ton and 125,000, the defendants would be liable to the same amount of payment; and, if but a small quantity of coal was conveyed, the toll, so called, as got at by this calculation, would no doubt be several thousand pounds per ton; and, even supposing a very considerable quantity of coal to be conveyed, the toll would far exceed the value of the coal in London. In my opinion this argument is not entitled to any weight. It is founded at

best upon the supposition, that some payments would certainly have to be made by the defendants to the plaintiffs; but, assuming that the profits of the plaintiffs' own trade, in a period of six months, enabled them to pay the dividends on the preference shares, and 3*l*. per cent. to their ordinary shareholders, and the defendants carried over the line of railway during the same period less than 125,000 tons of coals, then, under the contract, the defendants would have to pay nothing. And the same observation applies to the conveyance of any number, even millions of tons; for, if the profits of the plaintiffs' own trade enabled them to pay their shareholders 6*l*. per cent, the defendants would be entitled to carry any quantity of coal whatever over the railway without the payment of one farthing. It seems to me impossible, that, under such circumstances, the contract would be binding upon the plaintiffs within the true meaning of the 87th section, for in such case they would receive no toll at all.

But, assuming the contract between the parties to contemplate, that in all probability a payment would have to be made every six months by the defendants to the plaintiffs, the provision as to payment would be, that, after the ascertainment of the net profits made by the plaintiffs themselves during six monthly periods, then, if less than 125,000 tons of coal had been carried by the defendants on the railway during the same respective periods, the defendants were to make up to the shareholders of the plaintiffs' Company, for the passage of their engines and waggons over their line, the full amount of the guaranteed dividend on the preference stock, and 3*l*. per cent. on the ordinary stock, and so on, if larger quantities of coal were carried, until 6*l*. per cent. dividend was paid to the shareholders of the ordinary stock. Now, is this payment "tolls" within any reasonable meaning of that word in the 87th section? The interpretation clause declares tolls to include "any rate or charge, or other

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payment payable under the specification, animal, carriage, goods, merchandise, or things conveyed on the line having the most remote resemblance to be found in the special list, and, considering the meaning of the word in law and in the common language defined by the interpretation clause, there must be some relation between the goods made, and the engines and waggons to be conveyed over the line, some consideration of the rate, or charge, or payment, in my opinion, I think the word can be construed to mean payment as the parties may agree in this contract cannot in my judgment be ascertained what the framers of the Act in introducing the consideration of the shareholders at public meetings, it may very well be that they should state plainly and distinctly the nature of the consideration of payment to be made in respect of the articles to be conveyed.

In my judgment, therefore, that the true meaning of the recital in the deed seems to me to be a guaranteed amount of dividend to the plaintiffs' Company; which, in my opinion, for the defendants to contract to pay.

Assuming the two cases relied on for the defendants to be the law, I am of opinion if no authority on the subject but the point seems to me decided in *Denison (a)*. In that case, some

(a) *Ante*, p. 403; *S. C.*, 1

Great Northern Railway Company had agreed with the directors of the Ambergate Railway Company that the former Company should indemnify the latter against all liabilities, and work the Ambergate line under the agreement then made, until a special Act of Parliament was obtained enabling them to work the line on their own account; and they agreed that they would pay the Ambergate Company such tolls as would, after covering all expenses and liabilities, furnish a dividend of 4 $\frac{1}{2}$ per cent. upon the paid-up capital of the Ambergate Company. The legality of the agreement was impugned before Lord Justice *Turner*, then Vice-Chancellor, in the above case, and he was of opinion that it was illegal, and not a contract within the 87th section, because, in his opinion, the payment was not "tolls." He says, in his judgment, "tolls are defined to be dues receivable for the liberty of passing over highways, public or private—they are payments connected with the passing over. It is difficult to know what is the precise meaning of the word 'tolls' in the 87th section; but, in my opinion, the payments contracted for in the present case are not tolls within it. If I were compelled to give an opinion, it would be, that tolls should be fixed with reference to the number of carriages passing over the railway, the payment being in consideration of the passing over, both under the Act of Parliament and from the nature of tolls, they being a payment made in reference to the passing over. This payment is, in my opinion, not toll; and the agreement is, therefore, one which the defendants had no power to make." There is no difference whatever between that case and the present one upon the meaning of the word "tolls" in the 87th section. This judgment seems to me in point, and I concur with it. I think, with the Lord Justice, that it would be difficult indeed to define à priori what would or would not be toll within the 87th section; but I think that the payment contracted to be made in the present instance

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is not toll, and that the defendants such a contract, and that the deed

A judgment of Lord *St. Leon* *Eastern Counties Railway* (a), was possible not to concur with every his Lordship as to the repudiation of Companies; but the present, and must be decided according to law feelings or prejudice on one side or

I have only to add, that it seems that the contract is of a peculiarly objectionable public policy. The management of the Companies is necessarily intrusted with contracts like the present are made assuming that the directors of a company are entitled to enter into a contract without the sanction of the shareholders, of the terms of which was to be, a guarantee to the shareholders of a dividend upon the preference shares of at least, and possibly 6½ per cent. the inevitable consequence of the contract being made known to the shareholders, the shares of the latter would rise in value, and the shareholders of the former would lose pounds per share. And when it is considered that there is an enormous temptation would be the temptation to the directors to enter into contracts most prejudicial to the shareholders, in order that they themselves might have the opportunity of making profit by trafficking in the shares, but think that any contract of the kind is highly objectionable. In my opinion the contract is not entitled to the judgment of the Court.

PLATT, B.—[His Lordship read the material parts of the deed, and then contended that the contract was not

(a) *Anta*, p. 205; *S. C.*, 1 De C.

ly, each party thought that it would be beneficial for the respective Companies that the contract should be entered into and performed by each party. The plaintiffs stipulated for a certain price, which, with their net profits, would enable them in six months to pay their proprietors certain rates of dividend, varying with the use of the line by the defendants; and the defendants, being desirous of carrying coal from certain pits beyond that railway, and from thence on their own railway, consent to pay that price, according to the stipulation. Now, that is said to be illegal. In determining that question, the Railways Clauses Consolidation Act, 8 Vict. c. 20, sects. 3, 87, and the private Act, 10 & 11 Vict. c. ccxci. sects. 45, 51, 52, are important to be considered. The language of the interpretation clause (sect. 3) in the Railways Clauses Consolidation Act is, that the word "toll" shall "include," not that it shall be defined as "any rate or charge or other payment payable under the special Act for any passenger, animal, carriage, goods, merchandise, articles, matters, or things conveyed on the railway." This is certainly a payment which is payable in respect of the carriage of things on the railway, viz. coals. The next section which it is important to refer to is the 87th. [His Lordship read the section.] If the word "toll" is to be read in that large sense, then this is a payment agreed upon between the parties; because the reference to the amount of the dividends is merely as to the *modus solvendi*, although it is also the *modus computandi* with respect to the amounts payable for the six months traffic. That section seems to me to give the largest powers to Railway Companies to contract with each other in respect of the use of the railway of one Company by another for the conveyance and carriage of goods—in short, for any traffic which it may be beneficial to the one to be carried over their line, or beneficial to the other by having a right to the terminus of that line, so as to be enabled to carry forward the traffic from thence along their own line.

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The private Act, 10 & 11 Vict. c. ccxci., seems to me to go a great deal further. By the 45th section it is enacted, "That it shall be lawful for the Company to demand any tolls for the use of the railways not exceeding the rate following." Therefore, certain rates are here prescribed within which the demand for toll is to be made from any passenger, or any person sending goods. Now, that I call the Act of Parliament contract. If no special contract happens to have been made with the Company who has the use of the other Company's railway, no doubt the remuneration of the latter must depend on the contract into which they have entered with the public; and the amount which they would be entitled to demand must be limited by that stipulation.

But further, the 51st section provides, "That the restriction as to the charges to be made for passengers shall not extend to any special trains which may be required to run upon the railways, but shall apply only to the ordinary trains for the conveyance of passengers and goods upon the railway;" thus allowing a private bargain for a special train: so that if a person desired to travel by a special train, the Company might exact any amount, that case not being within the restriction of the 45th section.

Then the 52nd section provides, "That nothing herein contained shall be held to prevent the Company from taking any increased charges over and above the charges hereinbefore limited for the conveyance of goods of any description by agreement with the owners of or persons in charge of such goods, either in respect of the conveyance thereof by passenger trains, or by reason of any other special service performed by the Company in relation thereto." Surely this section cannot but contemplate a private agreement such as the present for what is called "toll," and, if so, the definition of toll is not limited to a payment made strictly under that name. Indeed, if the word "toll" were to be so construed, this agreement

would be unintelligible, because the payment which is described as "toll" is a sum, the amount of which is to be ascertained afterwards. Lord Justice *Turner*, in his judgment in the case of *Simpson v. Denison*, has defined "toll" as a "sum due and demandable for passing over and along a way, public or private." In my opinion, such limitation ought not to be given to the word "toll" in these Acts of Parliament. The whole matter is of new creation, and the Acts must be looked at for the purpose of ascertaining in what sense the word "toll" is to be understood. It seems to me, that the more proper definition of "toll" in these Acts would be a payment due, directly or indirectly, by force of the Act authorising the formation of the particular railway, explained and aided by the Railways Clauses Consolidation Act. The case of *Simpson v. Denison* has been cited as a case in point; but, when considered, it will be found to have no real application to the present case. That was a controversy in the Court of Chancery between the shareholders and the directors of a Company for the purpose of restraining the latter from acting upon an agreement into which they had entered on behalf of the Company. By that agreement the Great Northern Railway Company were to bear harmless the Ambergate Railway Company against all liabilities; and, until they should procure a special Act of Parliament enabling them to work the Ambergate traffic on their own account, they undertook to work the traffic under the agreement, and pay the Ambergate Company such toll as would, after answering all liabilities and expenses, furnish a dividend of 4*l.* per cent.; and furthermore, they agreed to pay 4*l.* per cent. on the paid-up capital of the Ambergate Company so soon as the Act of Parliament should be obtained. No doubt this agreement was a mere colour for the one Company to take, by way of lease, the railway of the other Company, at the rent of 4*l.* per cent. on the paid-up capital, with the further advantage to the

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4d. That is the computation upon the mere capital without taking into consideration one single farthing of profits, which would proportionably diminish the payable as dividends. Therefore, it is easily seen that this is a very reasonable contract for these respective companies to enter into, and that there is nothing extravagant in it, or which shews that either party would ultimately be losers by it. Indeed, an enormous and most extraordinary quantity of coals must be carried in order to meet that event which my learned Brother has contemplated, viz. a diminution of 3d. or 4d. per ton, until at last coal would be carried for nothing. However, as I have observed, there is no allegation on the record that the act was of an injurious character to the one side or the other. It is clear that it is a *bonâ fide* contract; the sole question is, whether the Acts of Parliament authorise these Companies to enter into such a contract; and I am of opinion that they do. The two contracting parties are the directors of the respective Companies, and if the proprietors have any reason to complain of this contract, there is a remedy open for them in the proper course, by which they may make the directors responsible for any loss sustained through their malversation.

It seems to me, however, that the legislature has vested the directors with very large powers, and that the execution of this deed has fallen within those powers. Therefore, I think the plaintiffs are entitled to the judgment of the Court; and I am glad that the question is on record, so that if we are wrong our decision may be corrected by a Court of error.

URKE, B.—The question in this case arises on a demurrer to the plea.

The pleadings have been sufficiently stated by my Brothers *Martin* and *Platt*.

The question, though one of great importance and somewhat difficult, lies in a very narrow compass, and depends upon

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the proper construction to be put on the 87th section of the 8 Vict. c. 20.

Generally speaking, all corporations are bound by a covenant under their corporate seal, properly affixed, which is the legal mode of expressing the will of the entire body, and are bound as much as an individual is by his own deed. Contracts with partnerships stand upon a different footing. They relate to the power of one member of a partnership to bind the other, and constitute a branch of the law of principal and agent. In partnerships, where all the members do not concur in the contract (and it is often that they do not), one partner may bind the other in all contracts within the scope of their ordinary partnership dealings; in those beyond, the individual partners making the contract are bound, not the other partners. But corporations, which are creations of law, are, when the seal is properly affixed, bound just as individuals are by their own contracts, and as much as all the members of a partnership would be by a contract in which all concurred. But where a corporation is created by an Act of Parliament for particular purposes, with special powers, then indeed another question arises; their deed, though under their corporate seal, and that regularly affixed, does not bind them, if it appears by the express provisions of the statute creating the corporation, or by necessary or reasonable inference from its enactments, that the deed was *ultra vires*—that is, that the legislature meant that such a deed should not be made. The cases cited in the argument of the *East Anglian Railway Company v. Eastern Counties Railway Company* (a), *M'Gregor v. Dover and Deal Railway Company* (b), and *Bagshawe v. Eastern Union Railway Company* (c) are of this description. Lord *St. Leonards*, though strongly expressing his dissatisfaction that Companies should set up such

(a) Ante, p. 150; 21 L. J., Q. B., 69.
C. P., 23.

(c) Ante, Vol. 6, p. 152; 19

(b) Ante, p. 227; 22 L. J., L. J., Chanc., 410.

nourable defences, intimates his opinion, given with reluctance, that these cases are rightly decided, and they are cases in which it appears that the Company enter into engagements clearly beyond their powers, that parties contracting with them must be supposed to know it.

The question then appears to me to be simply this, whether it can be reasonably made out from the statute that this covenant is ultra vires, or, in other words, whether it is to be entered into by either the plaintiffs or defendants; and that question must depend on the construction of the general Act, 8 Vict. c. 20, s. 87, incorporated with the particular Acts establishing each of these trading Companies.

Everything turns, in this case, upon the deed being made by the directors of their Company in fraud of the promoters of shares in either railway, for no such case is on the record, as it ought to be if it existed. The act must be assumed to be made bonâ fide on both

The question then turns entirely on the enactment of the statute. The 86th section empowers Companies to act as carriers of goods and passengers on their line, and to make reasonable charges. It does not prohibit traffic on their own account or otherwise on other lines, but merely to use their own. The 87th section extends the power to use other lines. It provides, "it shall be lawful for the Company from time to time to enter into any contract with any other Company, or with the owners or lessees or in possession of any other railway, for the passage over or along the railway, by the said Act authorised to be made, of any engines, coaches, waggon-sons, or other carriages of any other Company, or which may pass over any other line of railway, or for the passage over any other line of railway of any engines, coaches, waggon-sons, or other carriages of the Company, or which may pass over their line of railway."—If the clause had

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stopped here there would have been nothing to prevent the two Companies from making an agreement stipulating for this or any other mode of remuneration one to the other; but it goes on in these terms "upon the payment of such tolls, and under such conditions and restrictions as may be mutually agreed upon; and for the purpose aforesaid, it shall be lawful for the respective parties to enter into any contract for the division or apportionment of the tolls to be taken upon their respective railways."

The simple question then is, whether the words "upon the payment of such *tolls*" make it essential to the validity of an agreement between the two Companies that there shall be a stipulation to pay what is properly a toll, a payment for each carriage, or each certain quantity of merchandise, cattle, or the like, carried on the plaintiff's railway, and avoid all such agreements which do not contain a stipulation to make some such payment. Without these words, the Companies might certainly have made this agreement, or any other that they pleased; what is the effect of these words to limit their general right? Is it competent for both parties to agree to give a sum certain by the day, week, or month, for all the goods, or cattle carried during the week or month, or a sum certain for all not exceeding a given quantity, or to stipulate for any mode of payment different from a certain sum for each carriage or article on each journey, then the agreement in question is authorised by this clause. If it is once established that a fixed payment for each article carried is not a necessary condition, the degree of deviation from a fixed payment for each article is perfectly immaterial. However bad the bargain may be for one party, however imprudent or unreasonable with reference to the interest of the shareholders, however apparently objectionable in that respect to the interests of the proprietors of the plaintiffs' railroad, (as there is a possible case, though very far indeed from being probable, in which

nothing might be paid by the defendants to the plaintiffs), the bargain is binding just as much as a similar bargain would be between two individuals if they were respectively sole proprietors. If, indeed, there had been any fraud by one Company against the other, or any fraud by the directors of one Company against its own subscribers, to the knowledge of the other Company, in procuring a contract, the contract would be invalid, just as it would between individuals; but fraud is out of the question in this case, because it is not pleaded, nor indeed suggested. In the section in question the legislature leaves it to each of the two Companies, as the best judges, to take care of their own interests, and enter into any agreement they please, and to stipulate for any conditions and restrictions in the use of the plaintiffs' railway which they may think the most conducive to their benefit, but it requires that such "*tolls*" shall be paid as they mutually agree upon.

Unless the use of the term "*tolls*" restrains these contracting Companies, and obliges them to stipulate for certain payments for each article, there is nothing to restrain them from making such an agreement as this.

Now, by the interpretation clause, the term "*toll*" is to include *any rate or charge or other payment payable under the special Act for any passenger, and articles, matters, and things conveyed on the railway, and the word "tolls" is to have the meaning of including any rates, charges, or other payments, unless there be something in the subject or context repugnant to such construction.* Introducing that interpretation into the clause in question, and reading it as part of it, the parties may mutually agree upon such tolls, rates, charges, or other payments to be made for articles, matters, or things conveyed on the railway. That being so, is not this an agreement for a mode of payment for matters and things conveyed on the railway? It seems to me that it is; and

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there is nothing in the subject or context repugnant to that construction. As the legislature clearly gave to each Company, as the most competent judges of its own interests, full power to make any conditions and restrictions as to the use of each other's railways for the passage along them that they could mutually agree upon, can we suppose any good reason why the legislature could mean, nevertheless, to insist that every payment should continue to be a toll, and should be proportioned to the quantity of goods carried? It appears to me impossible to suggest any valid reason for such a supposition. When it gives such unlimited powers in all other respects, justly thinking that the parties best know what bargain to make, and that such bargain would be the most beneficial for all parties, why are we to suppose that they were intended to be restrained in this single particular, and bound to make the altered payments strictly correspond with the quantities of goods carried? I think they certainly were not so restrained; at any rate it is far from clear that they were; and the bargain having presumably been made, without any fraud, between two corporations whose contracts *primâ facie* bind just as much as those of individuals, and it not being made out that the Act prohibits such a bargain, the contract must be enforced.

The case before Vice-Chancellor now Lord Justice *Turner*, *Simpson v. Denison* (a), which was cited for the defendants, differs essentially from the present. It was not an agreement on behalf of the Great Northern Railway to carry goods on the line of the Ambergate Railway, but to work the whole railway and assume its liabilities; and the payments to be made could not be deemed tolls or payments or compensations of any kind for carriage. I do not, therefore, question the propriety of that decision; though, with a deference to so great an authority, I cannot acquiesce in

(a) Ante, p. 403; *S. C.*, 10 Hare, 51.

the correctness of the analogy, unnecessary for the decision of the case between corporations and partnerships, laid down in his judgment. They stand on an entirely different footing. I am of opinion, therefore, that the covenant on which this action is brought is not *ultra vires*, that is, it is not forbidden expressly or by implication by the Acts of Parliament relating to these Companies; and I am happy to find, that the law of this case coincides with the honesty of it, and does not sanction the breach by the defendants' Company of the solemn contract into which they have fairly entered, and from which they are trying to escape.

His Lordship then added—The Lord Chief Baron entertains doubts upon the subject, but he concurs with the majority of the Court for the purpose of pronouncing judgment in favour of the plaintiffs. The inclination of his opinion, although he had not formed a positive one, is with the judgment which has been given by my Brother *Martin*. Judgment will therefore be for the plaintiffs.

Judgment for the plaintiffs.

EXCHEQUER CHAMBER.

THE case was argued in the Court of Error (November 8 & 29, 1853,) by *Bramwell* for the plaintiffs in error, the defendants below; and by Sir *F. Kelly* for the defendants in error, the plaintiffs below: and in addition to the other cases the case of the *Shrewsbury and Birmingham Railway Company v. London and North Western Railway Company*, and *The Shropshire Union Railways and Canal Company* (a) was cited.

Cur. adv. vult.

(a) Ante, p. 531; 22 L. J., Chanc., 682.

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The judgment of the Court (a) was (February 1st) delivered by—

COLERIDGE, J.—The question in this case arises upon an agreement between two railways, which must be taken to have been made bonâ fide for the purpose of permitting the plaintiffs (the defendants below) to become carriers of coals in their own carriages upon the railway of the defendants (the plaintiffs below), but which was objected to as invalid, because its terms are such as are beyond the competency of the contracting parties to bind themselves to.

By the 87th section of the Railways Clauses Consolidation Act, one Railway Company is empowered to contract with another for the passage over or along the line of that other of its engines, coaches, waggons, or other carriages, upon the payment of such tolls, and under such conditions and restrictions, as may be mutually agreed upon. There is no doubt that the agreement in question is a contract within the first part of this sentence; it is a contract, the object of which is, and by which it is provided, that the plaintiffs may pass their carriages, laden with coals, over the line of the defendants; and, so far as its purpose and general stipulations provide for effecting this, it is clearly a contract which the two bodies were competent to enter into.

But it is a condition imposed, upon which the validity of the contract depends, that this use of the line shall be granted upon payment of tolls; under which word, by sect. 3 of the same Act, may be included, not merely tolls strictly so called, but also “any rate or charge or other payment payable under the special Act for any passenger, animal, carriage, goods, merchandise, articles, matters, or

(a) Coleridge, J., Maule, J., Wightman, J., Cresswell, J., Williams, J., Talfourd, J., and Crompton, J.

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the article to be paid for, and would be found so inconvenient a absurd.

And as, in respect of quantities, convenience and the circumstances of conveyance must be looked regard to variations in the rate seem essential to a payment for that it is not exactly the double. That a very large quantity of over a line of railway may be profitable or injurious, may be less expensive to the owners of according to circumstances; and circumstances operate, the rate of payment not vary with the quantity, if the law or justice are to prevail. At the same time it would not be more or less a toll variation.

Rejecting, therefore, the arguments that are imposed, and their proportionality to the quantities, as no arguments being tolls, there only remains for the payment, which must be made on the taking of the goods or other articles constructed for this purpose and other articles are placed on it for which toll is given as a remuneration for the use of the line. This can properly be considered as a remuneration for this. Thus the Company authorised the taking of toll for the use of the line, and A. brought 1000 tons, on it, and the Company should be paid for the whole quantities from the same opinion, be a taking of toll; and less tolls *merely* because the Com

sums not regulated in proportion to the respective quantities to be passed by A. and B.: other objections might or might not be taken according to circumstances in consequence of the inequality, but such inequality would not *per se* alter the character of the payments and make them cease to be tolls.

We may now apply this reasoning to the case before us, remembering that we are dealing with a contract which must be assumed to be *bonâ fide*, made with the purpose which appears on the face of it, and not colourably for any other. It appears, then, that the defendants' lines intersect the South Yorkshire Coal Field, and form the means by which the produce of such coal field may be transported to distant places for consumption;—that, the plaintiffs' lines communicating with the lines of the defendants, the former were desirous of making arrangements with the latter for the passage over their lines of the engines and the carriages of the plaintiffs, for the purpose of carrying coal, upon payment of a graduated toll in proportion to the quantity carried; that the carriage of coal forming an important branch of the defendants' revenue, they were apprehensive that such arrangements might injuriously affect both their coal traffic and general traffic, and therefore declined to accede to them, unless they should be guaranteed from injury therefrom; and that, as the two Companies were unable to determine upon any fixed rate of toll by which that could be secured, they had agreed to enter into a contract for tolls to fluctuate as the contract thereafter specifies.

Thus far we gather this, that the plaintiffs, not content to send their goods in the ordinary way on the defendants' line, are desirous of entering into a contract authorised by the 87th section before referred to, and of being allowed to be carriers themselves on the defendants' line, of an article which the defendants themselves were largely carrying on their own account. The contract which the

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plaintiffs desired to enter into was clearly then a contract for carrying—one authorised by the Act—one upon which tolls would lawfully become payable. But the defendants were not bound to enter into such contract, and they had a right to stipulate for a payment in respect of the carriage sought for, either such in amount or so graduated as to secure them from injurious consequences. Supposing that they could have arrived at that result by a rate of payment fixed under all circumstances, exceeding in any degree what they charged other persons, could it have been said that this was not a toll, because security from certain injurious results was an element considered in fixing the amount? Supposing it had been apprehended that the plaintiffs' carriages, or the goods to be loaded on them, had a peculiarly injurious effect on the permanent way of the defendants, and they had increased the charges to meet that injury, would not this still have been a toll? But if, in these cases, that could not have been denied, why should the payment, being fluctuating, or the desire to be saved from contingent injury to their own traffic, having influenced the amount, make any difference; the payment would still appear to be for passage, and passage would have been the object of the contract?

We pass on now to the terms of the contract as to remuneration. They are these in substance: the toll is to be calculated for periods of six months; if in any six months less than 125,000 tons of coal be carried, the plaintiffs are to pay such a sum as will enable the defendants to pay the dividends guaranteed on their preference shares, and 3 per cent. on the calls paid up on their ordinary shares, less the clear profits which they may themselves make in the same six months on their own undertaking; this sum of 3 per cent. is gradually advanced according to the increased quantity of coals carried, till it reaches 6 per cent., which it attains when the quantity is advanced to 400,000 tons or upwards; the advances

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quantity are by sums of 25,000 tons, with a provision that any increase less than that amount in any six months shall be carried to the credit of the next six months; and there is also a provision, that, if the advance in quantity shall ever raise the dividend to be paid to 4*l.* 10*s.*, the toll shall thenceforth never fall below the sum which will enable the defendants to pay that dividend.

Upon these terms it is objected, first, that if only a single ton be carried, still 3 per cent. on the paid-up capital will have to be paid by the plaintiffs; secondly, that, for any excess of quantity beyond 400,000 tons, nothing is to be paid; thirdly, that if the defendants should, by their own undertaking, make such clear profits as will enable them to pay the dividends stipulated for, according to the respective quantities of coals carried, the plaintiffs will pay nothing; fourthly, that, by deducting only the clear profits from the sum to be secured by the plaintiffs, they are in fact responsible for all the outgoings, and the defendants are relieved from all necessity of care and economy in their expenditure and management. These objections are not all founded in fact; for example, as to the second, it may be answered, that it is only a mode of reducing the rate per ton where the total quantity exceeds 400,000, so as to bring the total sum paid to the same as that paid for 400,000, still that for every ton something is paid. As, if I agree to carry 100 tons for 9*d.* per ton, and 150 for 6*d.*, the same amount will be paid in both cases, and yet something is paid for each ton. But, assuming all the objections to be founded in fact, they have no force in the argument, unless they prove the payment not to be tolls, that is, payment for the passing of goods, carriages, or passengers; the terms agreed on may, in certain extreme or even in probable cases, be attended with the consequences stated; and that they may be so is evidence of the character properly to be attributed to the payment, more or less strong, according to their proba-

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bility and importance; but it is only evidence, or a ground of inference; if the true character of the payment is, that it is made as a compensation for the passing of the goods, it will be a toll; and however improvident a bargain, however injurious to the plaintiffs, or unfairly advantageous to the defendants, however it may be attended with unforeseen and prejudicial consequences, still the directors of both Companies were authorised to make the agreement, and it must bind.

And, upon consideration, we agree with the majority of the Court below, that this is the true character of the payment. In ascertaining the rate of toll per ton, the plaintiffs had a perfect right to consider the danger which the defendants apprehended as a possible result to their own traffic, from agreeing to the plaintiffs' proposals; they tried to arrive at a security from this by a fixed rate, and they could not; had the defendants stipulated for, and the plaintiffs agreed to, some extravagant sum, in order to be sure of that result, consequences as unreasonable and inconvenient might have followed, and yet the bargain would have been unimpeachable. They have arrived at it by a system of graduated tolls; but once admit, that, in making the bargain, that result might properly be an object in view, and whether it is arrived at in one or the other way seems immaterial.

Suppose, in the negotiation, all the objections now urged had been brought forward, they would probably have been over-ruled by the answer, that there was no reason to be influenced by them or to guard against them, because there was none to apprehend that in fact they would arise. As to the first, it might have been said by the plaintiffs, "if the quantity we are likely to carry in a six months should be nominal, we shall carry none, and relieve ourselves from all payment; but we know by our engagements, that we are sure to carry a large quantity." As to the second, the defendants might have said, "we have

no expectation you will ever exceed 400,000 tons in any six months, but if you do, we may well afford to diminish our rate, so as to make your total payment the same as before." As to the third, both parties may have known well enough, that there was no reasonable expectation of the defendants being able to pay, or nearly to pay, the dividends stipulated for, out of the profits of their own undertaking. And so the other objections may have been disposed of, in fact, by the parties who were cognisant of all the circumstances, and were seeking, as men of business, to come to a practical conclusion. Though the consequences of a contract are very properly to be considered in determining its character, yet such as are remote or improbable ought not to be allowed much weight; for, in truth, they do not much influence the parties in forming it.

Upon the whole, we are of opinion that this contract was one which the directors were competent to make; and that the judgment of the Court below ought to be affirmed.

Judgment affirmed.

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COURT OF EXCHEQUER.

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Jan. 26th. In the Matter of an Arbitration between SAMUEL WA
and THE REGENT'S CANAL COMPANY.

Where part of a person's land is taken by a public Company, and the old approach to the land not taken is, by those means, cut off, an arbitrator appointed under the Lands Clauses Consolidation Act, 1845 (8 Vict. c. 18), has no power to determine the question as to the future access to the land, but can only award pecuniary compensation for the injury arising by reason of the loss of the old approach.

Nor ought the arbitrator to award com-

penation for future damage that may possibly arise to the land not taken by reason of the execution of the works, there being a remedy under the 68th section if such damage do arise.

Nor is he bound to award compensation, specifically, for damage sustained by reason of the land not taken having remained unoccupied, in consequence of the Company's notices under the Act.

Where one entire rent extends over the land taken, and that not taken, the arbitrator has no power to apportion the rent, but the apportionment must be effected under the 119th section.

BOVILL, (November 24), having obtained a rule to set aside the award made in this case, *T. F. Ellis* shewed cause; and *Bovill* appeared in support of the rule.

The material facts disclosed on the affidavits, and the points made by either party, fully appear in the judgment.

Cur. adv. vult.

The judgment of the Court (a) was (Jan. 26) delivered by

POLLOCK, C. B.—This was a rule obtained by *Mr. Bovill* to set aside an award. Cause was shewn against it by *Ellis*; when the following appeared to be the facts of

SHOWN.

By an Act called "The Regent's Canal Reservoir Act, 1851" (b), which was an Act to enable the Company proprietors of the Regent's Canal to enlarge a reservoir on the river Brent, the Lands Clauses Consolidation

(a) *Pollock, C. B., Parke, B., Alderson, B., and Martin, B.*

(b) 14 & 15 Vict. c. xxxii., local and personal, public.

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, (8 & 9 Vict. c. 18), was incorporated therewith. By the first-mentioned Act, the Canal Company were authorised to take two parcels of land on the river Brent, one portion of a field called "The Clay Field," near the Edgemoor-road, and another, numbered 43 and 44 in the parliamentary plan, further north upon the river; and the Act, after reciting that Mr. Ware was owner in fee of the latter parcel of land, enacted that, if he, within three months, gave notice that he required the Company to purchase the latter parcel of land, they were bound to do so; and the provisions of the Lands Clauses Consolidation Act, 1845, were declared to be applicable to this purchase. Mr. Ware duly gave notice to the Company to make this purchase; and the respective parties, namely, Mr. Ware on the one hand, and the Canal Company on the other, being unable to agree upon terms, by an instrument in writing, dated the 18th of March, 1853, under the provisions of the Lands Clauses Consolidation Act, appointed Mr. [Name] to be the single arbitrator, to settle the question of the proper compensation between them. The instrument was signed by reciting "The Regent's Canal Reservoir Act, 1851," and that the Canal Company, by a notice in writing, dated the 14th of July, 1852, had given notice that they required to purchase the piece of land numbered 43 and 44, which they were entitled to purchase and take by virtue of their Acts; and that, by another notice in writing, dated the 20th of December, 1852, they had given notice that they required to purchase a portion of the field called "The Clay Field," which they were also entitled to purchase and take by virtue of the Act. The instrument then proceeded to recite, that Mr. Ware, in pursuance of the power conferred upon him, had required the Company, by a notice, dated the 17th of June, 1851, to purchase and take the parcel of land which they were bound to purchase; and that they had given him the notice directed by the Lands Clauses Consolidation Act, of their desire to

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purchase it, and treat with him respecting it. It further recited, that, by a notice, dated the 15th of January, 1853, the Company had given notice to Mr. Ware, that they intended to cause a jury to be summoned, pursuant to the powers of the Lands Clauses Consolidation Act, for settling the question of compensation in the manner provided by the Act; and they thereby offered three separate sums of money to Mr. Ware for the purchase and taking of the three parcels of land before mentioned respectively, and for the damage to be sustained by Mr. Ware by the execution of the works by the Company's Acts authorised to be executed. The instrument then further proceeded to recite, that the Canal Company and Mr. Ware, being unable to come to an agreement as to the sums to be paid by the former to the latter for the purchase and taking of the said several parcels of land, and by way of compensation for the damages sustained by him by reason of the severance of the lands taken from his other lands, and otherwise injuriously affecting the same, by the exercise of the powers of their said Act, had concurred in the appointment of a single arbitrator (Mr. Tite) to settle the said question of disputed compensation; and they accordingly did so appoint the said Mr. Tite the sole arbitrator. And these notices and proceedings were in strict conformity with the Lands Clauses Consolidation Act. Mr. Tite, on the 4th of October, 1853, made and published his award, and awarded "that the compensation to be paid by the said Company to Mr. Ware for the purchase and taking of the parcel of land mentioned in the first notice, and for the damage to be sustained by Mr. Ware by the execution of the works by the Company's Act authorised to be executed, was the sum of 145*l*;" and the award then proceeded to award compensation in respect of the other two parcels of land in the same form of words.

An application was made to set aside this award, and a rule to shew cause was granted. The substantial ground

for the rule were, first, that the arbitrator had not determined the question of the approaches, way, or access to the close called "The Clay Field," a portion of which was taken by the Company; secondly, that the arbitrator had not decided on the question of compensation, in respect of certain leasehold pieces of land, marked (D.) in the plan, and mentioned in a certain statement submitted to the arbitrator; thirdly, that the arbitrator had not apportioned the rent of the leasehold land, and determined upon what portion of the property the rent should remain charged; fourthly, that the arbitrator had not decided the compensation in respect of the past damage sustained in respect of the freehold land, prior to the making of the award, by reason of the execution of the powers of the Acts, and the giving of the notices by the Company.

The first objection was supported by an affidavit, which stated, that, except through that part of the field called "The Clay Field," which was taken by the Canal Company, there was no way or approach to the remaining portion of "The Clay Field;" and that, in the statement submitted to the arbitrator, mentioned in the second objection, his attention was particularly called to this matter. An affidavit in answer stated, that "The Clay Field" was leased by Mr. Ware from the warden and fellows of All Souls College, Oxford, and that the Canal Company had agreed with them to convey a right of road, to enure for the benefit of Mr. Ware and the tenants of "The Clay Field," more commodious than the old road; and that they had sent to the warden and fellows a grant of the said right of road, which joined the highway at the same spot where the old road had done, and was shorter and more convenient. Independently, however, of the facts stated in the affidavits, we are of opinion, that the omission to take notice of this claim for the approaches and way forms no objection to the award; and indeed we think, that, if the arbitrator had at all awarded in respect of it, he would have exceeded

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his power. The authority of the arbitrator was exclusively under the Lands Clauses Consolidation Act, 1845, and no special or particular power was given to him; and we are clearly of opinion, that the compensation to be given under it is a pecuniary compensation only. The clauses in the Act relating to this subject are from the 16th to the 68th, both inclusive. By these clauses, there are three modes provided for settling the compensation: first, if the compensation claimed do not exceed 50*l.*, it is to be settled by two justices (sect. 22); secondly, if the compensation claimed exceed 50*l.*, and if the party claiming compensation desire to have it settled by arbitration, it shall be so settled (sect. 23); thirdly, if not so settled by arbitration, it is to be settled by a jury (sect. 39). In sect. 25, directions are given as to settling the question of compensation by arbitration, and the arbitrator is to hear and determine the matter which shall be *in dispute*. Now, upon reference to the submission in the present case, it is clear, that the matters in dispute are exclusively *amont of money, and nothing else*; nor indeed, under the authority of the Lands Clauses Consolidation Act, 1845, could they be otherwise, as we have already said; and it is quite impossible to introduce the statement laid before the arbitrator into the submission. It is not any part of the rule whereby the submission is made a rule of Court, nor could it possibly have been made so. That the compensation to be given under the Act is to be exclusively a pecuniary compensation, is further shewn by the 49th and 63rd sections. The 49th section enacts, that the jury shall deliver their verdict separately "*for the sum of money to be paid for the purchase of the land, and for the sum of money to be paid by way of compensation for the damage, if any, to be sustained by the owner by reason of the severance of the land taken from the other land of the same owner, or likewise injuriously affecting such land by the exercise of the provisions of the Acts.*" And the 63rd section

enacts, that the arbitrator shall, in estimating the purchase-money or compensation, regard the very same several matters. It seems to us, therefore, quite clear, that the arbitrator has done right in awarding a money compensation only; and that he would have gone ultra vires if he had awarded in respect of the approaches and way. Indeed, it is quite obvious that the greatest difficulties would arise if parties were entitled to demand approaches and ways to be awarded to them. The railway companies, who mainly act upon the Lands Clauses Consolidation Act, and for whose benefit, principally, the Act was passed, are merely entitled to take a strip of land upon which the railway is to go. They have no means of giving rights of way, because they have not land over which to give them; and all that can be done, when a way cannot be obtained (which is not very frequently the case), is to give the proprietor a full money compensation for the destruction of his way or access.

The second objection is, that the arbitrator has not decided the question of compensation in respect of certain pieces of land marked D. in the plan. The pieces of land marked D. are at a little distance from one of the parcels of land mentioned in the submission, but are not themselves mentioned in it at all; and it is stated in one of the affidavits upon which the rule was obtained, that, in the judgment of the deponent, these pieces of land must of necessity, if the works are executed by the Company, be in flood time flooded, and thereby greatly injured. The affidavit in answer states that no injury whatever has hitherto arisen; and, looking at the map and the situation of the pieces of land D., it seems to us that the arbitrator could not with propriety have included any compensation in respect of these pieces of land in his award. If any injury should hereafter arise, Mr. Ware will be entitled to compensation under the 68th section, which is expressly provided to meet such a case as this.

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The third objection is, that the arbitrator had not apportioned the rent of the leasehold land, or determined upon what portion of the property the rent should remain charged. The answer to this is, that he had no power whatever to do so; for the landlords of Mr. Ware, warden and fellows of All Souls College, were no parties to the submission, and of course no apportionment of rent by the arbitrator would be binding upon them. But it is quite clear that the apportionment of the rent under such circumstances is not within the authority of the arbitrator at all, but it is to be effected under the provisions contained in the 119th section of the Lands Clauses Consolidation Act.

The last objection is, that the arbitrator had not decided the compensation in respect of the past damage sustained in respect of certain of the lands prior to the making of the award, by reason of the execution of the powers of the Act and the giving of the notice by the Company to treat. The affidavits do not state that any of the works authorised by the Act have been begun or made; but one of them states, that from the time of the notices the lands were unlet and untenanted, and that Mr. Ware was put to the expense of keeping a man in possession to take care of the property, and that he abstained from letting the land for the reason of the same being about to be taken by the Company. The affidavits do not state, whether, in point of fact, the arbitrator did allow any compensation, or not, in respect of this alleged damage. But the arbitrator has awarded, in the very words of the Act itself, the amount of compensation to be paid for the purchase and taking of the lands, and the damages to be sustained by the execution of the works (see sections 18, 21, and 38). This seems to us, therefore, to be no substantive ground for setting aside the award.

Rule discharged.

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Feb. 2.

THE twelfth count of the declaration stated, that the plaintiff tendered to the defendants, being common carriers from London to Sheffield, at a certain place in London, being a place by them, the defendants, then used in their business as such common carriers for the receipt of goods to be by them carried, a certain package of goods of the plaintiff, and requested the defendants, as such common carriers, to receive the same, and to carry it for the plaintiff from London to Sheffield, and at the last-mentioned place to deliver the same for the plaintiff; and although the defendants, before and at the time of such tender as aforesaid, had ample means and convenience for receiving and delivering the said package according to the said requirement of the plaintiff in that behalf, and although the plaintiff was, before and at the time of such tender, ready and willing, and then offered, to pay to the defendants such sum of money as they the defendants were then legally entitled to receive for the receipt, carriage, conveyance, and delivery of the said package, according to the said requirements of the plaintiff, and also all other charges whatsoever, which the defendants, as such common carriers or otherwise, were authorised or in any way entitled to make or receive; of all which the defendants had notice. Yet the defendants, not regarding their duty as such common carriers as aforesaid, but contriving and wrongfully and unjustly intending to injure the plaintiff, did not nor would, at the said time when they were so requested, or at any other time, receive the said package according to the said requirement of the plaintiff in that

By the 14th section of the 13 & 14 Vict. c. lxi., the Great Northern Railway Company is empowered to demand for the carriage of small parcels any sum which they may think fit. The Railways Clauses Consolidation Act, 8 Vict. c. 20, is incorporated with the special Act; and sect. 90, while it empowers a Company to vary the tolls upon their railway as they may think fit, provides, "that all such tolls be at all times charged equally to all persons, and after the same rate, in respect of all . . . goods of the same description, and conveyed by a like carriage passing only over the same portion of railway under the same circumstances, and no reduction or advance in any such tolls shall be made, either directly or indirectly, in fa-

vour of or against any particular company or person using the railway:—*Held*, that the Company were compelled to charge all persons alike; and that, although they might charge for "packed parcels" at a higher rate than an ordinary package, they were not justified in charging a carrier more than the rest of the public.

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behalf and for the purpose aforesaid, but wholly neglected and refused so to do, although a reasonable time that behalf had elapsed before the commencement of the suit, and although they the defendants, as such common carriers, might and could and ought to have received and carried, conveyed, and delivered the same; whereby the plaintiff was forced and obliged to carry, convey, and deliver the said package of goods as aforesaid, with great labour, cost, and inconvenience, and was put to great expense, &c.

Plea that the plaintiff, before or at the time when the defendants were requested to receive and carry the package of goods therein mentioned, was not ready and willing nor did he offer, to pay to the defendants the money and charges which the defendants were entitled to receive and make for the receipt, carriage, conveyance, and delivery of such package of goods, as the plaintiff has alleged. Issued thereon.

At the trial, before *Erle*, J., at the Summer Assizes at Liverpool, it appeared in evidence that the plaintiff was a carrier, and that the defendants had refused to carry the package tendered to them by the plaintiff to be carried, as stated in the twelfth count, unless 11s. 8d. were paid for it, and that the grounds of this refusal were, that the package was what is commonly called a "packed parcel," (i.e. made up of small parcels to be delivered by the plaintiff to different consignees), and that the plaintiff was not a carrier. According to the general scale of charges of the defendants, the charge for the carriage of the package in question would have been 1s. 11d. The defendants justified their extra charge under their private Act (13 & 14 Vict. c. lxi. s. 14), which enacts, "as regards small packages and single articles of great weight, notwithstanding the rate of tolls prescribed by this Act, the said Companies may lawfully demand the tolls following, that is to say—For the carriage of small parcels, that is to say, and

parcel not exceeding five hundred pounds weight, the said Companies may demand any sum which they may think fit: provided always, that articles sent in large aggregate quantities, although made up of separate parcels, such as bags of sugar, coffee, meal, and the like, shall not be deemed small parcels, but such term shall apply only to single parcels in separate packages." And it was contended on the part of the defendants that they might legally make any charge that was reasonable.

The plaintiff relied on the 90th section (a) of the Railways Clauses Consolidation Act, 1845 (8 Vict. c. 20), which Act is incorporated with the defendants' private Act, as qualifying the above 14th section; and that the circumstance of the plaintiff being a *carrier* did not render a different charge upon him from the rest of the public legal. The learned Judge was of opinion that that circumstance would make a difference, and that the plaintiff was not using the defendants' railway "under the

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(a) The 8 Vict. c. 20, s. 90, is as follows:—

"Whereas it is expedient that the Company should be enabled to vary the tolls upon the railway, so as to accommodate them to the circumstances of the traffic; but that such power of varying should not be used for the purpose of prejudicing or favouring particular parties, or for the purpose of collusively and unfairly creating a monopoly either in the hands of the Company or of particular parties; be it enacted, that it shall be lawful therefore for the Company, subject to the provisions and limitations herein and in the special Act contained, from time to time to alter or vary the tolls by the special Act authorised to be

taken, either upon the whole or upon any particular portions of the railway, as they shall think fit; *provided that all such tolls be at all times charged equally to all persons, and after the same rate whether per ton per mile, or otherwise, in respect of all passengers, and of all goods or carriages of the same description, and conveyed or propelled by a like carriage or engine passing only over the same portion of the line of railway under the same circumstances; and no reduction or advance in any such tolls shall be made, either directly or indirectly, in favour of or against any particular Company or person travelling upon or using the railway.*"

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same circumstances" as the rest of the public. And the jury, under his direction, found a verdict on the twelfth count for the defendants, leave being reserved to the plaintiff to move to enter a verdict for him for 1*l.* 17*s.* 3*d.*

Atherton having obtained a rule nisi accordingly.

Knowles, *Hugh Hill*, and *R. Hall*, shewed cause, as admitted that the cases of *Pickford v. Grand Junction Railway Company* (a), *Parker v. Great Western Railway Company* (b), and *Edwards v. Great Western Railway Company* (c), were authorities in the plaintiff's favour and that the 90th section of the 8 Vict. c. 20 was not distinguishable from the 7 & 8 Vict. c. iii. s. 50 (d), and which latter section the Court of Common Pleas had held in the two latter cases, that carriers could not be legal charged on a different scale from the rest of the public.

Atherton and *Kemplay* were not called upon to support the rule.

(a) 10 M. & W. 399.

(b) 11 C. B. 545.

(c) *Id.* 588.

(d) The 7 & 8 Vict. c. iii. s. 50, is as follows:—

"It shall be lawful for the Great Western Railway Company, whenever they shall act as carriers, or shall provide locomotive or steam power, or carriages for the conveyance of passengers, animals, goods, wares, merchandise, articles, matters, or things, to charge, for such locomotive or steam power and carriages, such sum, (not exceeding the sums, if any, limited by the said recited Acts, or any of them), and that either per ton or per mile, or by bulk, number, measure, or admeasurement, or by

fixed charges, as they shall think expedient: provided always, that in whatever way the said charges are made, they shall be made equally to all passengers in respect of all animals, &c., and things of like description and quality, and conveyed in or propelled by a like carriage or engine passing only over the same portion of, and over the same distance along, the said railway or either of them, and under like circumstances; and no deduction or advance in any such charges shall be made partially, either directly or indirectly, in favour of or against any particular company or person."

PARKE, B.—I am of opinion that this rule must be made absolute. It is impossible to distinguish the 90th section of the 8 Vict. c. 20 from the 50th sect. of the 7 & 8 Vict. c. iii. The defendants must charge all persons equally who convey goods by their railway under like circumstances. They may increase their charges according to the increased risk or liability incurred; but they are not at liberty to make any difference between individuals. We are bound by the decisions of the Court of Common Pleas, who have already expressly decided this point under the Great Western Railway Act.

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MARTIN, B.—I am of the same opinion. This case is not distinguishable from the cases in the Court of Common Pleas. The defendants may make an additional charge for a package of the description in question, but they must charge *all* persons alike. They must not treat a carrier differently from the rest of the public. I should be sorry to make any distinction between the effect of the two Acts of Parliament, merely from the minute difference in the words used in them respectively, intended as they were to carry out the same object. According to these Acts carriers are to be treated precisely as other individuals.

PLATT, B., concurred.

Rule absolute.

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Nov. 16th.

THE EASTERN UNION RAILWAY COMPANY v. COCHRANE

The defendant executed, as surety, a bond to a Railway Company, conditional for the faithful discharge by H. C. of his duties as clerk, so long as he should continue in the service of the Company.

Whilst H. C. continued in such service, that Company and another Railway Company were dissolved and united into one Company by an Act of Parliament, which enacted, that "all bonds &c., made or entered into before the union, with, in favour of, or by or for either of the dissolved Companies, should be and remain as good, valid, and effectual, in favour of and against, and with reference to the new Company, and might be proceeded on and enforced in the same manner,

to all intents and purposes, as if the new Company had been a party to and executed the same, had been named or referred to therein, instead of the persons, company, or party actually named therein;" and also, that "every clerk, &c. who was in the service of either of the dissolved Companies their union, should, immediately after it, hold and enjoy his office and employment with the salary thereunto annexed, until he should be removed therefrom by the new Company." H. C. accordingly remained in the employ of the new Company:—*Held*, that the defendant was liable to the new Company for a breach of the bond committed by H. C. after the union.

DECLARATION, that, after the passing of the 7 & 8 Vict. c. lxxxv., intituled "An Act for making a Railway from Colchester to Ipswich;" and before the passing of the 10 & 11 Vict. c. clxxiv., intituled "An Act to amalgamate the Eastern Union and Ipswich and Bury St. Edmund's Railway Companies," the defendant, by his writing obligatory, sealed with his seal, acknowledged himself to be held and firmly bound to the Eastern Union Railway Company, being the Company incorporated by the first-mentioned Act of Parliament, in the sum of 200*l*.; which writing obligatory was and is subject to a certain condition thereunder written, whereby, after reciting that one H. Coles had been taken into the employment of the last-mentioned Company, it was and is declared, that, the said H. Coles did and should, from time to time and at all times thereafter, so long as he should continue in the service of the last-mentioned Company, well and truly observe and perform all the rules, regulations, orders, and directions of the directors for the time being, or of the secretary of the last-mentioned Company, or either of them, and did and should diligently, faithfully, and honestly conduct and employ himself in and about the business of the last-mentioned Company, and did and should from time to time, when thereunto required by the directors for the time being of the last-mentioned Company or any of them, or such secretary as aforesaid, deliver unto the

him a true and faithful account in writing of all monies, notes, bills, securities for money, orders, papers, writings, matters, and other things which he the said H. Coles had seen or should be entrusted with by the last-mentioned company, or which had come or should come to his hands on account and for the use of the last-mentioned Company, and also did and should, from time to time and at all times thereafter, pay over and deliver to the said directors, or to such person or persons as they should appoint on that behalf, all monies, bills, notes, securities for money, property, matters, and things whatsoever, which had already come or should thereafter come to the hands or possession of the said H. Coles for or on account or for the use of the last-mentioned Company, and which should not have been previously duly made good or accounted for by the said H. Coles; and also, that, if the defendant and the G. Ellis should save harmless and keep indemnified the last-mentioned Company from and against all losses, costs, charges, damages, and expenses, which should or might arise or happen, or be incurred or sustained by the last-mentioned Company, by reason of any fraud, deceit, concealment, neglect, carelessness, or improper conduct of the said H. Coles, or of any other act or thing whatsoever to be done, committed, or omitted by the said H. Coles, in and during his said service, or which by ordinary and proper care, diligence, and attention might have been prevented or provided against, or which should be contrary to the duty of the said H. Coles in his employment as aforesaid, or which might happen by his conniving at or sanctioning any unlawful act contrary to his duty as aforesaid, then and in such case the bond or obligation should be void and of none effect, otherwise to be and remain in full force and virtue.—Averments: that, after the passing of the second-mentioned Act of Parliament, the Commissioners of Railways, under their seal in manner mentioned in that Act, granted the certificate by the same Act required,

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for the dissolution of the Companies therein called "The Dissolved Companies," and for the incorporation of the Company therein called "The New Company," whereupon and whereby the said new Company became and was incorporated, and the plaintiffs were and are that new Company:—That the said H. Coles continued in the service of the Company to whom the said bond was given until and at the time when the same was so dissolved and from thence continued in the service of the plaintiffs for a long time under the contract by which he was, recited in the said condition, taken into the employment of the Company therein mentioned.—Breach: that, while H. Coles so continued in the service of the plaintiffs, did not diligently, faithfully, or honestly conduct or employ himself in or about the business of the plaintiffs; but on the contrary thereof, while he continued in the service of the plaintiffs, wrongfully discontinued employing himself in and about the business of the plaintiffs, and wrongfully deserted the same, and absconded therefrom. Other breaches were assigned—by the appropriation of monies and omission to pay over monies received, &c., by the said H. Coles, "while he so continued in the service of the plaintiffs."

Demurrer.

O'Malley (*Dasent* was with him), in support of the demurrer.—The defendant executed the bond, which the plaintiffs are seeking to enforce, for the faithful discharge by H. Coles of his duties as clerk "*while he should continue in the employ*" of the Eastern Union Railway Company (incorporated under the 7 & 8 Vict. c. lxxii). That Company was dissolved by the 10 & 11 Vict. clxxiv. (a), and united with "The Ipswich and Bury

(a) The following sections of the 10 & 11 Vict. c. clxxiv. seem material:—

The 1st section, after reciting the 7 & 8 Vict. c. lxxxv., which was repealed by a Company was incorporated

nd's Railway Company," and incorporated under the name of "The Eastern Union Railway Company,"

the style of "The Eastern Railway Company;" the Vict. c. xcvi., whereby a ny was incorporated under the style of "The Ipswich and St. Edmund's Railway Company;" and other Acts relating or enlarging the above enactments, "That, from and immediately after the Commission of Railways shall have granted a certificate in manner after mentioned, the said new Union Railway Company and the said Ipswich and St. Edmund's Railway Company shall be respectively repealed."

Section 2 repeals the 7 & 8 c. lxxxv. and parts of the 1 Acts.

Section 3 enacts, "That, from immediately after the granting of the said certificate, the persons and corporations, who were, immediately before the granting thereof, proprietors or partners in the capital or joint stock of either of the said dissolved Companies, shall be united in the new Company, for the purpose of holding, completing, maintaining, using, and working the railways, &c., then made, &c., and incorporated by the name of the Eastern Union Railway Company."

Section 10 enacts (inter alia), "That, from and immediately after the granting of the said certificate . . . , all conveyances, contracts, agreements, mortga-

ges, bonds, covenants, and securities, made or entered into before the granting of such certificate to, with, in favour of, or by or for the dissolved Companies or either of them, or any person duly authorised on their behalf, shall, immediately after the granting of such certificate, be and remain as good, valid, and effectual, in favour of, and against, and with reference to the new Company, and may be proceeded on and enforced in the same manner, to all intents and purposes, as if the last-mentioned Company had been a party to and executed the same, or had been named or referred to therein, instead of the persons, Company, or party actually named therein respectively."

Section 14 enacts, "That every clerk, agent, collector, and other officer, who, at or immediately before the granting of the said certificate, was in the service of either of the dissolved Companies, shall, immediately after the granting of the said certificate, hold and enjoy his office and employment, together with the salary and emoluments thereunto annexed, until he shall be removed therefrom by the new Company; and every such clerk, agent, collector, and officer, shall have the like powers and authorities, and shall be subject and liable to the like pains and penalties, and to the like power of removal, and to the like rules

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the present plaintiffs. And the question is, whether defendant is liable for breaches of the bond committed by II. Coles after the union of the two Companies. It may be conceded, that all bonds given to either of the amalgamated Companies before their union remain still in force, and can be put in suit by the present Company, so far as the subject-matter of the contract is not changed; but here it is sought to make the defendant a surety for faithful service in a different, or, at least, more extensive employment than that in which he undertook to be a surety. And no principle of law is more established than that any alteration or extension of the employment discharges the person for whose good behaviour the surety is bound. Now, if the defendant is to be held liable by reason of the construction of the 10th section of the plaintiffs' Act, by the same construction under a contract to supply one of the old Companies with all the rails they may require, the contractor would be bound to supply sufficient for the enlarged wants of the new Company. The case of *The London and Brighton Railway Company v. Goodwin* (a) is obviously distinguished from this, there the breaches were committed *before* the amalgamation of the Companies, though sued for afterwards. It is also cited *Stracey v. Nelson* (b).

Bramwell, for the plaintiffs, was stopped by the Court.

POLLOCK, C. B.—Our judgment must be for the plaintiffs. The question turns on the construction to be put on the 10th section of the 10 & 11 Vict. c. clxviii, which says in effect, that all contracts entered into by either of the dissolved Companies shall remain valid and effectual, either for or against the new Company, and may be enforced as if the new Company had been a party to the

and regulations in all respects whatsoever, as if he had been appointed by the new Company after the granting of the said

certificate."

(a) 3 Exch. 320.

(b) 12 M. & W. 535.

is clearly the plain and literal meaning of that; and applying it to the case of a bond given by a, is any hardship that has been suggested sufficient to compel us to put a different construction on the section? of opinion that we are bound by the plain language of the Act, and that it means what the plaintiffs contend. And I feel no doubt, that this meaning was also intended by the Legislature. For, if the Legislature had expressly contemplated the continuing of the liability in every bond, what other language could it have used which would have left less doubt than the actual language

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MR. B.—I am of the same opinion. Statutes must be construed according to their plain grammatical meaning; unless such interpretation would lead to any manifest absurdity, in which case the actual language used may be modified, so as to escape this absurdity. Now, the construction of the section in question: The first part applies to bonds already forfeited; the latter part to other securities entered into with or by old Companies, and those securities are “to remain good, valid, and effectual in favour of and against, with reference to, the new Company, and may be relied on and enforced in the same manner, to all intents and purposes, as if the new Company had been bound to and executed the same, *or had been named therein* instead of the persons, Company, or surety actually named therein.” This bond, therefore, must be read, as if the name of the new Company had been inserted in it instead of that of the old Company, and it becomes a contract with the new Company in the same way as with the old Company. But then it is said, this is an injustice in the case of a surety; that is not so. The employment of the clerk would continue the same as under the old Company. Therefore, practically, this construction will produce no inconvenience. In the

the quantity required by one or them. In the present case, the language of the section does not suggest practical injustice suggested by the defendant. The case of *The London and Brighton R. Co. v. Goodwin* turned on a similar point; and there much as now, though in that case it was necessary to go so far as in the present. But, I think the 10th section extends to make the defendant liable.

ALDERSON, B.—I am of the same opinion. The language of the statute must no doubt be construed so that the nature of the contract absolutely requires it. It is of a contract to supply rails for the use of a particular Company, the extent of the contract is not to be enlarged by the union of that Company with another; but the new Company would have a right to insist on a supply of rails for the extension of their line as would be equivalent to the original line to be supplied. But the modification seems requisite. The words are plain; and the true rule of construction in such law and to most other matters, is, that words are to be taken in their obvious and natural sense.

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**IN V. THE DERBYSHIRE, STAFFORDSHIRE, AND WOR-
CESTERSHIRE JUNCTION RAILWAY COMPANY.**

Nov 3rd.

was a rule obtained by *Selfe*, in Trinity Term, un-
der the 36th section of the Companies Clauses Consolida-
tion Act, 1845, (8 Vict. c. 16) (a), calling on Sir J. F. Fitz-
gerald to shew cause why a writ of scire facias should not
issue against him as a shareholder in the Derbyshire, Staf-
fordshire, and Worcestershire Junction Railway Company,
to issue execution against him on the judgment
obtained by the plaintiff against that Company.

appeared from the affidavits, that the action had been
brought to recover 2000*l.* and upwards for engineering

An affidavit in support of an application under the Companies Clauses Consolidation Act, 1845, (8 Vict. c. 16, s. 36), for a scire facias, in order to issue execution against F. as a shareholder of a Company, against which a judgment had been obtained, stated, that de-

fendant being foiled in his attempts to obtain a sight of the registry, and so to obtain authentic information on the subject, instituted inquiries aliunde, as to who really were the shareholders of the Company; and deponent hath been credibly informed, by persons officially connected with the Company, and which information deponent verily believes to be true, that the said F., who was a director from the commencement, was a duly registered shareholder of seventy shares in the Company; and that 1085*l.* was due thereon in respect of subscriptions not called up, the Company being 20*l.* shares, and only 4*l.* 10*s.* per share having been paid up or called: "at this affidavit shewed *prima facie* that F. was a shareholder, and, being unanswered, it

8 Vict. c. 16, s. 36, that "If any execution, law or in equity, shall be issued against the property or effects of the Company, and the same cannot be found sufficient to levy such execution, the Court may order execution to issue against any of the shareholders to the extent of their respective shares in the Company not then paid up. Provided always, that the Court shall not order execution to issue against any shareholder, except by the order of the Court in any action, suit, or other

proceeding shall have been brought or instituted, made upon motion in open Court, after sufficient notice in writing to the person sought to be charged; and upon such motion such Court may order execution to issue accordingly; and for the purpose of ascertaining the names of the shareholders, and the amount of capital remaining to be paid up on their respective shares, it shall be lawful for any person entitled to any such execution, at all reasonable times, to inspect the register of shareholders without fee."

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services, and that there was a balance of 275*l.* remaining due to the plaintiff upon the judgment. The affidavit the plaintiff stated, that he had made unsuccessful attempts to get inspection of the register of the shareholders, and then proceeded in the following terms:—"And the deponent having been thus foiled in his attempts to obtain a sight of the registry, and so to obtain authentic and official information on the subject, deponent instituted inquiries aliunde, as to who really were the shareholders of the Company; and deponent hath been credibly informed by parties officially connected with the said railway, and which information deponent verily believes to be true, that the said Sir J. F. Fitzgerald, who has been a director of the said Company from the commencement, at the date of the writ was a duly registered shareholder of seventy shares in the said Company, and that 10*l.* 5*l.* was due thereon in respect of subscriptions not called up, the shares in the said Company being 20 shares, and only 4*l.* 10*s.* per share having been paid up or called." The affidavits further stated, that there had been various ineffectual attempts to levy on the goods of the Company, and that the deponent verily believed that the Company had no goods or effects of any kind whatever on which an execution could operate.

T. Atkinson (November 3rd) shewed cause.—The affidavits are insufficient to bring Sir J. F. Fitzgerald before the Court. The 36th section of the 8 Vict. c. 16, under which this application is made, directs that the plaintiff shall be at liberty to inspect the register of shareholders in order to ascertain the names of the shareholders, which has not been done here; the plaintiff has merely resorted to hearsay evidence; and it does not sufficiently appear from the affidavits that Sir J. F. Fitzgerald is a shareholder of the Company. [*Parke, B.*—The Act does not preclude a person seeking this remedy under the 36th section, from resorting to other means of proof besides the register of share-

rs; and the affidavits, being unanswered, sufficient-
ake out, as it appears to me, a primâ facie case, that
erson sought to be charged is a shareholder.]

lfe, in support of the rule, was not heard on this point.

ER CUBIAM(a).—The rule must be made absolute. The
vits on the part of the plaintiff disclose enough to
or an answer from the other side, which has not been
1.

Rule absolute.

(a) *Pollock, C. B., Parke, B., Alderson, B., Platt, B.*

IN THE EXCHEQUER CHAMBER.

Hilary Term, 1854.

EAST LANCASHIRE RAILWAY COMPANY v. THE LANCA-
SHIRE AND YORKSHIRE RAILWAY COMPANY.

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Jan. 12.

RROR from the judgment of the Court of Exche-
: in the case of *The Lancashire and Yorkshire*

It was agreed
between "The
Manchester,
Bolton, and

Railway Company," and "The Bury and Rossendale Railway Company," "first, that they
mutually concur, at the expense of the latter Company, in obtaining an Act of Parliament for
of railway from the Manchester and Bolton Railway to Bury and Rawtenstall; secondly, that
ury and Rossendale Railway Company should have the use of the Manchester and Bolton Com-
station at Salford, but not to impede the Manchester and Bolton Company's traffic, paying
charge for such requisite additional accommodation to the same, arising from the traffic of the
and Rossendale Company, as any three indifferent persons, to whom it should be referred in
usual way, should determine; thirdly, that the traffic of the Manchester, Bury, and Rossendale
any, whether of passengers, merchandise, or coal (that is, traffic using both lines or any portions
of), between Salford and Rawtenstall, or any points intermediate to these, should be carried on,
pects engine-power and carriages, clerks and porters, and all other expenses (except the main-
ce of the Manchester and Bolton Railway), at the costs and charge of the Bury and Rossen-
Railway Company, who should pay to the Manchester and Bolton Railway Company, for the
their railway and in respect to the traffic therein specified, a pro ratâ proportion (according to
stance passed over the two lines respectively), of all and singular the gross rates, tolls, and pro-
arising from the said traffic, with a proviso, that nothing therein contained nor elsewhere pro-
should authorise the Manchester and Bolton Railway Company to receive, for the use of their
y between the point of junction of it with the Bury and Rossendale Railway and Salford, for
ter distance than half the length between such point of junction and the terminus of the Man-
er and Bolton Railway at Salford; nevertheless, the Manchester and Bolton Railway Company
l be entitled to charge, for the use of such portion of their railway, for a length of two miles at
ast." After the making of this agreement the Manchester, Bolton, and Bury Railway Com-
was incorporated with the Manchester and Leeds Railway Company, and ultimately became

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The special verdict is set out at length in the report of the case in the Court below (b). It was amended in the Court by inserting an agreement, dated 11th of January 1848, between the Lancashire and Yorkshire Railway Company of the one part, and the East Lancashire Railway Company of the other part; which recited the agreements of the 14th of November, 1843, and the deed of ratification of the 22nd of January, 1844, and the agreement of the 14th of March, 1846; and by which the East Lancashire Railway Company agreed to advance 10,000 £ to provide additional accommodation at the Salford station for their traffic: and it was further agreed (inter alia), that places for such additional accommodation should be forthwith settled by two persons named, with proviso, that, if they disagreed, the East Lancashire Railway Company should be at liberty to build a station on land to be leased to them by the Lancashire and Yorkshire Railway Company.

The case was argued (May 10th, 1853) by

Hugh Hill (*J. Henderson* was with him) for the plaintiff in error, the defendants below; and by

"The Lancashire and Yorkshire Railway Company," and the Bury and Rossendale Railway Company became "The Manchester, Bury, and Rossendale Railway Company," and ultimately, after further extensions, became "The East Lancashire Railway Company;" and by subsequent Acts of Parliament certain other railways became incorporated with it. The length of the Manchester, Bury, and Rossendale Railway, from the station at Salford to its point of junction with the Manchester, Bury, and Rossendale Railway, at Clifton, was four miles and no more:—*Held*, in the Exchequer Chamber (reversing the judgment of the Court of Exchequer), that the right of the East Lancashire Railway Company, under the agreement, to use the railway of the Lancashire and Yorkshire Railway Company was extended by the subsequent Acts of Parliament to all traffic passing over the original line of the former from or to Manchester, whether its transit commenced or ended in any part of the line, and whether it came from or went to any station upon any part of the new and extension line; but (affirming the judgment of the Court of Exchequer) that the pro rata proportion of toll, payable by the East Lancashire Railway Company, was to be ascertained by the relative distances passed on the two original lines specified in the agreement.

(a) 7 Exch. 129; ante, Vol. 6, p. 802. (b) Ante, Vol. 6, p. 802.

Atherton for the defendants in error, the plaintiffs below.

The only point argued was, whether the agreement of the 14th of November, 1843, was extended by the subsequent statutes. The nature of the arguments sufficiently appears from the judgment.

Cur. adv. vult.

The judgment of the Court (*a*) was delivered (January 12) by

COLERIDGE, J.—This was a writ of error from the Court of Exchequer. In that Court, in the argument and judgment on a special verdict, two points were discussed and determined; upon one the decision was for the plaintiffs in error, and upon that no question was made in the argument before us, nor is it necessary for us to say more than that we concur in the judgment of the Court below. Upon the other point judgment passed for the now defendants, who were the plaintiffs below; and money having been paid into Court by the now plaintiffs, which according to that decision was insufficient, the result of the cause was against them, and they now question that decision as erroneous.

The plaintiffs in error were originally incorporated as the Manchester, Bury, and Rossendale Railway Company, and the defendants as the Manchester and Leeds Railway Company. Prior to the incorporation of the former, and with a view to it, an agreement was entered into, subsequently confirmed by a deed and Act of Parliament, on the construction of some parts of which the question now to be considered turns.

That agreement (*b*) was in the following terms: [His

(*a*) Lord Campbell, C. J., Coleridge, J., Wightman, J., Williams, J., and Crompton, J.

(*b*) Of 14th November, 1843; vide ante, Vol. 6, p. 804.

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Lordship read the agreement.] Subsequently to this agreement, and to the passing of the Act by which the plaintiffs were incorporated by the name of the Manchester, Bury and Rossendale Railway Company, and by which the provisions of the agreement were confirmed, another Railway Company was incorporated, the object of which undertaking was in effect to extend the plaintiffs' line from Bury to Acreington, and thence by two diverging lines to Blackburn and Colne. This undertaking the plaintiffs were to be at liberty to purchase, and to become the East Lancashire Railway Company; and in August, 1845, they did so. Subsequently, by the 9 & 10 Vict. c. cccii., another Company, the Blackburn and Preston Railway Company, was consolidated with the plaintiffs.

These extensions of the plaintiffs' lines, and consequent increase of the traffic which they bring upon the portion of the defendants' line spoken of in the agreement, and the greater use which they make of the defendants' stations, with the greater accommodation they require for its reception and disposal, give rise to the question we are now to decide. The defendants contend that the agreement limits the plaintiffs' use of their line and stations upon the terms there stipulated, to the traffic beginning on some part of the original line of the Manchester, Bury and Rossendale Railway Company in its way to Manchester, and ending on some part of it in its way from Manchester. The plaintiffs insist, that their right extends to all traffic which passes over their original line from or to Manchester, whether its transit commences or ends in any part of that line, or whether it comes from or goes to any station upon any part of the new and extension lines. The Court below were of opinion with the defendants, and we have come, upon consideration, to the opposite conclusion.

The agreement applies to a certain portion of the defendants' line commencing at Clifton and ending at Sal-

ford; any railway which could be joined on to it, or be allowed to use it, would thereby be furnished with an entrance into and an exit from Manchester. To the plaintiffs, who at the date of the agreement were seeking for an incorporation, such entrance and exit were indispensable. Either they must procure them separately for themselves at a vast expense, and we know not with what difficulty, or they might procure permission to use the way already prepared, that, namely, of the defendants. This was the object which the plaintiffs had in view in entering into the agreement. On the other hand, to the defendants it must, of course, have been very desirable to secure for themselves on fair terms the increased traffic which the new undertaking might be expected to bring on so much of their line, and also to prevent the formation of any new and rival entrance into Manchester, and to preserve their monopoly of the traffic arising in its immediate neighbourhood on that side.

These considerations were the natural basis of the arrangement between the contracting parties; in terms, of course, the Manchester, Bury, and Rossendale Company would only be spoken of; for the existence of the plaintiffs only by that name, and as that Company, was then in direct contemplation. But the clear intention was to provide for the transit, upon the stipulated terms of payment, of all the traffic which should be passing to or from any part of the plaintiffs' line, wherever that traffic should come from, however it might be supplied, or wherever it might be going to. Anything short of this would have defeated the manifest purpose of both parties, which was, to render a new entrance unnecessary. Canals, therefore, coaches, carriages, or waggons might feed the new railway with goods, cattle, or passengers. These might come from all or any parts of the country through which the extension lines are now made, or goods or passengers might be in their way to any parts: to whatever extent this

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might grow, whatever means might be resorted to to increase the business on the plaintiffs' line. All this would be within the terms, as it was clearly within the spirit of the agreement, because it would be traffic using the plaintiffs' line. The only thing to be guarded against by the defendants was the plaintiffs' passing goods or passengers on the specified portion of their line at the lower rates, which had not *bonâ fide* passed or were not about to pass on their own line; this would have been a rival use of the line, defeating the very object which the defendants had in view in entering into the agreement, a mere loss to them to the indirect profit of the plaintiffs. But so long as the traffic, which took advantage of the terms stipulated by the agreement, was such as had previously passed, or was about to pass, on all or any part of the plaintiffs' line, the danger of this was avoided. The agreement, therefore, is confined to traffic using the line or some portion of it, and the object is specially provided for by the 7 & 8 Vict. c. lx. ss. 252, 253, the statute which confirms and carries out the agreement. If then, instead of being fed by canals, coaches, or any other such mode, new lines of railway should be made at any time, and the traffic should be brought by these to the terminus, or to any station along the plaintiffs' line, how could such traffic, after passing along that line to the Clifton junction, be prevented from passing along the defendants' upon the terms of the agreement? To say that it should not pass would be to impose a limitation on the agreement, not only not expressed nor within its spirit, but in itself most unreasonable, the limitation, namely, that the plaintiffs' line must continue to be fed only by the means of conveyance in use at the time when the agreement was made. Indeed, to be consistent, such a limitation must forbid even the formation of new roads to the line, anything, in short, the effect of which would be to increase the traffic upon the plaintiffs' line; unless it be said that the only thing

which the plaintiffs might not do was to increase their traffic by permitting the junction of new railways with their own. If it be admitted to be unreasonable to suppose that the plaintiffs could be intended to be restrained from permitting such a junction, but that still the traffic which should be supplied by the new feeder should not claim the benefit of the agreement, another consequence, scarcely less unreasonable, must be supposed to have been in contemplation; for the limitation so contended for must have this effect, that, as the traffic which before came on the plaintiffs' line from coaches, waggons, &c., would certainly, for the most part, cease to come in that way, and would be brought by the new railways, the plaintiffs would be deprived of nearly all benefit of the agreement. But if such a limitation could not be applied in the case of new railway lines formed by independent companies, and merely terminating in a junction with the plaintiffs' line, why should it be at all the more, if these same lines should become amalgamated with the plaintiffs' undertaking? That single difference would be wholly unimportant to the defendants, the traffic would still pass over the original line, and fulfil all the terms of the agreement.

Two reasons are assigned for the judgment of the Court below: the first, that, when the agreement was made, the traffic of the plaintiffs' original line could alone have been contemplated and no other, for there was no other; and in one sense this is true. The only traffic contemplated was certainly that which should have passed, or be about to pass, over that line or some part of it, and which might, therefore, be called the traffic of the line; but it is not true, if thereby traffic supplied from any particular area be intended. The traffic of a line does not properly mean traffic limited to arise from the country within a certain distance right and left along its length, as the judgment seems to suppose, when it speaks of traffic arising on a railway of fourteen miles as compared with that on a rail-

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way indefinitely extended. However the feeders of the line be multiplied, and however much, in consequence, the traffic may be increased, which are matters, in the neighbourhood of great centres of commerce or manufactures, to a great extent independent of length of line, still the traffic which passes on it is traffic of the line. In this case there is nothing to shew, that any such limit as this argument supposes was ever in the contemplation of the parties to the agreement.

The other argument on which the judgment is rested, is the necessary limitation imposed by the limited power of accommodating the traffic at the Salford station. Now we think this is met by the agreement itself, explained by arrangements subsequently made in pursuance of it. By the second clause of the agreement, the plaintiffs "are to have the use of the defendants' station at Salford, *but not to impede the defendants' traffic*, and they are to pay such charge for such requisite *additional* accommodation to the same, arising from their traffic, as any three indifferent persons, to whom it shall be referred in the usual way, shall determine." The defendants, therefore, protect themselves from being incommoded, and they provide for the charge of such increased accommodation as may be rendered necessary, to an indefinite extent.

But it does not stand on this alone, for it appears by the special verdict, that, at a later period, when the plaintiffs, by amalgamation with other lines, had become the East Lancashire Railway, and when the defendants were about to amalgamate with a new line, which it was desirable for them that the plaintiffs should not oppose, new arrangements were come to, which embodied the old agreements, with some alterations, and, among others, gave the plaintiffs a right to pass with their traffic on to a new station, called the Victoria station. The traffic is then spoken of as the East Lancashire traffic, and it would be forcing language to limit that expression to the traffic originally spoken of as that of the Bury and Rossendale Company,

These words are to bear the meaning contended for by the defendants.

But it was then stipulated, that places for the accommodation of the plaintiffs' traffic at the Salford station should forthwith settled by two persons named; and in case their disagreeing, the plaintiffs were to be allowed to build for themselves on land to be leased to them by the defendants. While, therefore, the defendants protected themselves from being incommoded in their own traffic by the plaintiffs' use of their stations, it is clear that, in the beginning and since, they have contemplated an indefinite increase of accommodation, at the expense of the plaintiffs.

In the argument, reliance was placed by the counsel for the defendants on the provision in the original agreement, which is substantially confirmed and secured by penalties in the Act of Parliament, for regulating the rates of payment to be made by the plaintiffs for the use of the defendants' line. But this appears to us to create no difficulty in the way of the plaintiffs: a pro ratâ proportion is to be ascertained by the terms of the agreement, according to the distance passed over the two lines respectively; where the words "the two lines" can only mean the original lines specified in the agreement, these will remain always the same, whatever new lines, by way of extension or branch, may be added to either. These are but feeders, either they bring the old traffic by new modes of conveyance, or they bring more, but in neither case does there seem any necessity for altering the proportions originally agreed on. Looking, therefore, to the language of the agreement itself, to the unquestionable objects of the parties in framing it, and to the consequences of the constructions respectively contended for, we are of opinion that that on which the plaintiffs in error rely is the true one; and consequently, that the judgment of the Court below must be reversed.

Judgment reversed.

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COURT OF EXCHEQUER

*Hilary Term, 1853.**Jan. 22nd.*SCOTHORN and Another v. THE SOUTH STAFFORDSHIRE
RAILWAY COMPANY.

The plaintiff delivered at a station on the defendants' railway, a package, addressed "S. & Co., East India Docks, passenger ship Melbourne, Australia," and paid one sum for the carriage to London.

By the practice of the defendants, goods delivered at that station for London are carried by their own line to Birmingham, and thence by the London and North Western Railway to London.

Before the package reached London, the plaintiff gave the clerk at the London station of the London and North Western Railway Company, an order (written across the receipt which had been given for the package)

to send it to "S. & Co., Bell Wharf, Ratcliffe London;" which order the clerk promised to obey, saying, there was no extra charge. The package was, however, delivered according to the first address, and consequently lost:—*Held*, that the defendants' contract was to deliver according to the plaintiff's directions; that the plaintiff had a right to countermand his original direction; that the clerk was the agent of the defendants to carry out their contract, and therefore to receive the countermand; and that the defendants were liable for the loss consequent on the countermand having been disobeyed.

DECLARATION.—That the plaintiffs, on &c., delivered to the defendants certain goods of the plaintiffs, to be safely carried and conveyed from a station on the defendants' railway, called "The Great Bridge Station," to London, and then paid the defendants a sum of money as their hire and reward in that behalf; and the defendants then promised the plaintiffs to deliver the goods according to the direction of the plaintiffs in that behalf. Breach.—That, although the plaintiffs afterwards directed the defendants to deliver the goods at a certain place in London, called "The Bell Wharf, Ratcliffe, London;" and although the defendants by the servants of the London and North Western Railway Company, their lawful agents in that behalf, promised to deliver the goods according to the direction of the plaintiffs, yet they neglected to do so, and, contrary to such direction, transmitted them to "Melbourne," in the colony of Australia; in consequence of which the plaintiffs lost and were deprived of the goods—concluding with special damage.

Pleas.—First, that the goods were not delivered to the defendants to be carried from "The Great Bridge Station" to London. Secondly, that the defendants did not promise to the plaintiffs to deliver the goods according to the directions of the plaintiffs. Thirdly, that the plain-

iffs did not direct the defendants to deliver the goods at 'The Bell Wharf, Ratcliffe, London.' Fourthly, that the defendants did not promise by the servants of the London and North Western Railway Company to deliver the goods according to the directions of the plaintiffs. Fifthly, that the defendants did not neglect to deliver the goods according to the directions of the plaintiffs; nor did the defendants, contrary to such directions, transmit the goods to Melbourne. Sixthly, that the London and North Western Railway Company were not the agents of the defendants. Issues thereon.

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At the trial, before *Martin*, B., at the Sittings in Middlesex in Michaelmas Term, 1852, it appeared in evidence, that the plaintiffs delivered, at "The Great Bridge Station" of the defendants' railway, certain packages, to be carried by the defendants to London, which were directed 'Scothorn & Co., to the East India Docks, passenger ship Melbourne, Australia.' The carriage of the goods to the East India Docks was paid to the clerk at the station on their delivery, and a receipt given by him for them. By the practice of the defendants, all goods delivered at the Great Bridge Station for London are carried on the defendants' own line to Birmingham, and then forwarded by the London and North Western Railway to London. Before the packages reached London, the plaintiff Scotthorn came to London, and, being unable to procure a passage in the Melbourne, called at the Euston Station of the London and North Western Railway Company, and left with one of the clerks of that company the receipt which had been given to him on the delivery of the packages, having first written across it, "Send the boxes, &c., to Scotthorn & Co., Engineers, Bell Wharf, Ratcliffe, London.

"GEORGE SCOTHORN."

In answer to questions by the plaintiff, the clerk said the packages should be forwarded according to the new

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direction on the following day, and that there was no additional charge. However, on their arrival in London, the packages were forwarded to the "Melbourne," and carried to Australia, and there lost.

The learned Judge left the question to the jury, whether the clerk at the Euston Station had authority from the defendants to receive such a countermand as that given by the plaintiffs, which they found in the affirmative; and a verdict was entered for the plaintiffs, with leave to the defendants to move to enter a nonsuit.

Bramwell having in the same Term obtained a rule nisi accordingly,

Edwin James and Hawkins (Jan. 22nd.) shewed cause—The Railway Company is not in a different position from another carrier. When, therefore, a railway company undertakes, for reward, to carry a parcel from one terminus to another, they are liable for the loss of it during its transit, whether it occurs on their own line or on another: *Muschamp v. The Lancaster Railway Company*(a), *Watson v. The Ambergate Railway Company*(b). The ground of these decisions is, that the other company must be taken to be the agent of the contracting company: so, here, the North Western Company must be taken as the agents of the defendants; and the countermand given to one of the clerks of the former is a countermand given to the defendants, which they were bound to obey; and they are, therefore, liable for the loss.

Gray in support of the rule.—The principle of the decision in the cases cited is not disputed. It may be conceded, that the North Western Company were the agents of the defendants to carry out the contract with the plain-

(a) 8 M. & W. 421.

(b) 15 Jur. 448.

. But it is contended, that the contract made by the clerk was a different contract, and not that which the defendants had entered into, which was to deliver on board Melbourne, and that contract has been carried out. Alderson, B.—The contract was to deliver according to the plaintiffs' directions. It was competent to the plaintiffs to countermand the original destination of the parcel.] It may be, but even then the clerk was not the defendants' agent to receive this countermand. But even if it had been, the declaration is framed on a new contract.

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ALDERSON, B.—This rule must be discharged. There can be no doubt that the defendants made a contract to carry the goods of the plaintiffs the whole way to London, for a certain reward, for that entire journey; and there can be as little doubt that they would also have been liable for any loss occasioned by negligence during any part of that journey. The whole question is, what was the contract between the parties; and that, in truth, is a question of fact merely. Now, there is abundant evidence, that the contract was that stated in the declaration, to deliver in London according to the plaintiffs' directions. It is true, that, originally, when the goods were delivered to the defendants to be carried, the directions were to deliver them at the East India Docks; but the plaintiffs communicated to the defendants' agent their altered intention, and directed him to deliver the goods, not as directed, but elsewhere. The question is not whether the agent in London was authorised to make a fresh contract on behalf of the defendants. He was authorised to deliver the goods according to the plaintiffs' directions, that being the original contract. That contract was not performed, and the defendants are therefore liable.

PLATT, B.—The power to receive the countermand was

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part of the contract itself. The declaration states contract truly, that the defendants received the goods to be delivered according to the plaintiffs' directions; means that the plaintiffs were to have some control over them, and might stop them at any part of their transit. Though the original direction was to deliver them at the East India Docks, yet, that order having been countermanded, the defendants had no right to take them there. If a carrier undertakes to carry goods from A. to B., he is subject to the right of the owner to countermand the original direction at any point in the journey, though perhaps the latter may be bound to pay for the whole transference; but the carrier has no right to carry the goods against the express will of the owner. I think that it is incidental to the employment of the clerk, that he should do all that the defendants themselves would have been bound to do in performance of the original contract. The defendants were bound to act on a reasonable countermand; and the clerk was, therefore, their agent to receive it. In my opinion, therefore, my brother *Martin's* direction to the jury was perfectly right.

MARTIN, B.—I entirely concur. The whole transaction when looked at is clear. The plaintiffs' goods are at the defendants' station, with a direction that they should be delivered on board a ship in the East India Dock. This is said to be the contract. In one sense it is no more than the case of a person delivering his goods to another to be disposed of according to the direction of the owner; and can it be contended, that, if the owner went an hour after the delivery and said, "I have changed my mind, let me have my goods back again," the carrier could have had a right to reply, "No, you have made a contract with me about them, and they must go on board the ship?" A carrier is employed as the bailee of goods on the terms of obeying the owner's directions in re-

hem; and I have no doubt that the owner has a right to demand them at any period of the transit when they be got at. The redemand or subsequent direction of the owner must be reasonable. And I can easily conceive the owner placed in such a position that they cannot be got till the end of the journey, though it is usually otherwise; but, to say that a railway company, or any other carrier, is only bound to deliver goods according to the owner's *first* directions, is a proposition wholly unsupported either by law or common sense. Suppose the case of a man having booked himself by railway to a certain station, and subsequently determining not to proceed beyond a nearer station, he has a right to stop and require that his luggage be delivered up to him; but, if Mr. *Wyllie's* argument were correct, the Company might say, "No, we have contracted to carry it to the end of the journey, and we will take it on." The true contract under such circumstances appears to me to be, that the carrier is a bailee for reward. The bailee may be entitled to the reward, but the owner is entitled to receive back his goods whenever he chooses. The bailee must deliver according to the owner's directions. But then, it is urged on the part of the defendants, assuming this to be true, that the defendants carried the goods only part of the way; and, in my opinion, that does not make the slightest difference, for they made the London and North Western Company their agents to carry, and, consequently, to receive a countermand. I do not say that the London and North Western Company were the defendants' agents to make a fresh contract to carry to an entirely different destination from that originally named, such a contract would not have bound the defendants. But I am clearly of opinion, that the plaintiffs had a right to require their packages to be delivered at a place other than the original address, and that the clerk had authority from the defendants to assent to such fresh orders. Taking a com-

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mon sense view of the matter, the clerk was the servant of the defendants to carry out their contract,—to execute the orders of the owners of goods which the defendants had contracted to carry.

Rule discharged.

Trinity Term, 1853.

May 30th.

PAULING and Another v. THE LONDON AND NORTH WESTERN RAILWAY COMPANY.

A clerk to an engineer of the defendants, a Railway Company, agreed with the plaintiff for the purchase from him of some railway sleepers on certain special terms. The sleepers were afterwards delivered to and used by the Company:—
Held, that there was evidence from which a jury might infer a parol contract by the directors, on behalf of the Company (which would be valid under the 8 Vict. c. 16, s. 97), on the terms agreed to by the clerk.

FIRST count, that the plaintiffs, at the request of the defendants, agreed to sell to the defendants, and the defendants agreed to purchase from the plaintiffs, 6000 Heckmatack sleepers, at 3s. 1½d. each, which were to be delivered by the plaintiffs, for the defendants, at the Elmore or Egerton yard, in Liverpool, and were to be paid for by the defendants to Messrs. Houghton & Smith, in cash, on delivery; (mutual promises).—Breach: that, although the plaintiffs did afterwards sell and deliver the said 6000 Heckmatack sleepers according to the terms of the said agreement, and the defendants then took and accepted the same, and although Messrs. Houghton & Smith were ready and willing to have accepted payment of the same according to the price aforesaid, amounting to 937l. 10s., yet the defendants have not paid Messrs. Houghton & Smith or the plaintiffs.—Second count, for goods bargained and sold, and for goods sold and delivered.

Pleas, first, that the defendants did not promise; secondly, to the second count, a set off; to which the plaintiffs replied “not indebted.”

At the trial, before *Martin, B.*, at the Spring Assizes, 1853, at Liverpool, it appeared in evidence that on the 18th of February, 1852, the plaintiff Pauling wrote to one

H. Eborall, a clerk of the engineer of the defendants, follows:—

‘ Dear Sir,—I will undertake to deliver to you in the wharf, at Liverpool, 7000 Heckmatack sleepers, nine feet long, ten inches by five, for 3s. 1½d. each, paying all portage and cartage, &c., the sleepers to be taken as they lie in the stack, with the exception, that all undersized sleepers to be rejected by you. Should this offer be accepted, I shall be glad to give you an order on my agents Liverpool, Messrs. Houghton & Smith, for their immediate delivery, they having charge of them for me. The voice will have to be made out in their name.

“ Yours truly,

“ GEORGE C. PAULING.”

On the 20th of February, Eborall replied as follows:—

“ Dear Sir,—On consideration of your offer of the 18th instant of 7000 Heckmatack sleepers, I have no objection to accept it on account of the London and North Western Railway Company, for 6000 of them, provided they be delivered to our inspector or agent in the Ellesmere or Egerton yard, Liverpool, free from shakes and other imperfections, to size, and approved of by him and selves, at 1½d. each; and, if agreeable, on receipt of your order on Messrs. Houghton & Smith, we will commence shipping them.

“ Yours truly,

“ WILLIAM HENRY EBORALL.”

On the 21st of February, the plaintiffs’ agent sent to Eborall the following answer:—

‘ Sir,—I accept your offer of 6000 Heckmatack sleepers, delivered at the Ellesmere or Egerton yard in Liverpool, 3s. 1½d. each, to be paid Messrs. Houghton & Smith cash on delivery, the sale being to you on account of the London and North Western Railway Company. I

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inclose an order on Messrs. Houghton & Smith, Liverpool to deliver the sleepers.

"I am, Sir, your obedient Servant,

"ROBERT FRY,

"Pro PAULING & Co."

A person, employed by the defendants, took the order mentioned in this letter to Messrs. Houghton & Smith and received and removed the sleepers to the station of the Company, and they were afterwards used on the defendants' line.

The invoice, with the sleepers, was as follows:—

"Liverpool, 27th February, 1852

"London and North Western Railway Company.

"Bought of Pauling & Co.,

"Per Houghton, Smith & Co.,

"6000 Railway Sleepers, 9 × 10 × 5, at 3s. 1½d. 937l. 10s.

On the 13th of May the plaintiff Pauling received the following letter:—

"London and North Western Railway Company.

"Audit Office, Euston Station, May 13th, 1852

"Sir,—Having a payment to make on account of Pauling & Co. for sleepers purchased from Messrs. Houghton & Smith, Liverpool, amounting to 937l. 10s., as below stated, I have to request you to say whether you prefer the balance being sent to you direct, or to the parties above named, and oblige,

"Yours truly,

"W. KENDRICK,

"Per J. GOALEN,

"C. Pauling & Co.

"(W. KENDRICK)"

"Cr. Amount of account for sleepers £937 10 0

"Less the sum due to the London and North Western Railway Company for hire of engine whilst making the Clifton Branch

- - £231 10 0

"Balance £706 0 0"

The plaintiffs requested the Company to pay the price of the sleepers to Messrs. Houghton & Smith, according to the agreement contained in the foregoing letters; but the Company refused, on the ground that the defendants were indebted to them in the above set-off of 231*l.* 10*s.* In the course of the correspondence which took place on the subject the plaintiffs received the following letter from the secretary of the Company:—

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“Liverpool, 14th June, 1852.

“Gentlemen,—Your favour of the 8th, addressed to the directors, has been forwarded to me here. The delay which has taken place in complying with your direction to pay to Messrs. Houghton, Smith, & Co., the amount due to you for sleepers, arises from our solicitors having informed me that several claims had recently been made on this Company in reference to the Clifton Branch contract, for which you were the responsible party. I will endeavour that no further delay shall take place than what may be required for the adjustment of the several matters referred to.

“I remain, Gentlemen, your obedient Servant,
“H. BOOTH.”

The learned Judge left it to the jury to say, whether the Company had contracted on the terms stated in the declaration, and disclosed in the correspondence. The jury found this in the affirmative, and a verdict was entered for the plaintiffs on the first count for the whole demand, leave being reserved to the defendants to move to enter a verdict for them on that count; it being agreed, that in the event of the motion being successful, the verdict should stand for the plaintiffs on the second count, reduced by the defendants' set-off to 706*l.*

Milward having, in Easter Term, obtained a rule nisi accordingly,

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Hugh Hill and Cowling (May 30) shewed cause.—
was amply sufficient evidence in support of the first.
The 97th section of the Companies Clauses Consol
Act, 8 Vict. c. 16(a), enables the directors to contract
half of a Company by parol in cases where a priv
dividual could make a valid contract without v
And the jury might well infer, from the fact of the s
having been used by the Company, that the direct
contracted for them on the terms of the agreem
Eborall. *Lowe v. The London and North Western
way Company*(b) is a distinct authority that such
tract may rightly be inferred where the Compan
had the benefit of the contract. They also cited *S
v. St. Neot's Union*(c), *De Grave v. Mayor of Monmo
and Finlay v. Bristol and Exeter Railway Comp
and distinguished the cases of *The Mayor of Lud
Charlton*(f), and *Diggle v. London and Blackwall R
Company*(g).*

(a) The 8 Vict. c. 16, s. 97,
enacts, "That the power which
may be granted to any such com-
mittee to make contracts, as
well as the power of the direct-
ors to make contracts on behalf
of the Company, may lawfully
be exercised as follows (that is
to say), With respect to
any contract which, if made be-
tween private persons, would by
law be valid, although made by
parol only and not reduced into
writing, such committee or the
directors may make such con-
tract on behalf of the Company
by parol only, without writing,
and in the same manner may
vary or discharge the same.
And all contracts made accord-
ing to the provisions herein con-
tained shall be effectual in law,

and shall be binding up
Company, and their suc
and all other parties
their heirs, executors, o
nistrators, as the case r
and on any default in t
cution of any such c
either by the Company
party thereto, such act
suits may be brought, ei
or against the Company, a
be brought had the sam
tracts been made betwe
vate persons only."

(b) 21 L. J., Q. B., 361
p. 524.

(c) 6 Q. B. 810.

(d) 4 Car. & P. 111.

(e) 7 Exch. 409; ante,]

(f) 6 M. & W. 821.

(g) 5 Exch. 442; ante,
p. 590.

Milward in support of the rule.—The first count has been treated as a count for goods sold and delivered; but it is a special count framed for the express purpose of excluding the defendants' set-off. The case of *Homersham v. The Wolverhampton Waterworks Company*(a) was decided upon this 97th section; and the Court held, that a contract by the directors could not be inferred. Then, as to the general principle that corporations are liable in certain exceptive cases, the mere adoption of the subject-matter of the contract does not per se make the Company liable: *Paine v. Strand Union* (b), *Lamprell v. Billericuy Union*(c), *Diggle v. London and Blackwall Railway Company* (d), *Finlay v. Bristol and Exeter Railway Company*(e). Moreover, the correspondence, relied on as shewing the contract, was with a mere clerk of the engineer, not with the secretary or other authorised officer of the Company, whose duty it would be to communicate with the directors. The inference of a contract by them is, therefore, much less natural than if the writer had been one of their own immediate employés.

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POLLOCK, C. B.—I am of opinion that this rule must be discharged. There was ample evidence to justify the jury in coming to the conclusion that there was a contract with the Company on the terms contained in the correspondence. That correspondence took place between the plaintiffs and a person in the service of the Company. It is immaterial to consider in what particular capacity; he was a servant of the Company, and acting on their behalf in the correspondence. And I cannot entertain the distinction attempted to be made between a clerk of an engineer of the Company, and a clerk of the Company. The

(a) 6 Exch. 137; ante, Vol. 6, p. 790.

(b) 8 Q. B. 326.

(c) 3 Exch. 283.

(d) 5 Exch. 442; ante, Vol. 6, p. 590.

(e) 7 Exch. 409; ante, p. 449.

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special count is framed on the contract disclosed in correspondence; and there is evidence of the goods, subject of that contract, having been received and by the Company. There was no evidence of any contract than that contained in the correspondence; it is but fair, therefore, to infer, that there was such a contract with the Company. The case of *Lowe v. London and North Western Railway Company*(a) is an authority to the full extent, that, under these circumstances, the jury might well infer a contract with the Company. The learned counsel for the defendants minutely analysed the various decided cases on the subject, and attempted to distinguish them from the present. But, if minute differences are to be relied on, and particular expressions in various judgments to be laid hold of, and brought forward as the law of the land, there would be no great difficulty in raising doubts on points which would otherwise appear beyond dispute. In the present case there is no difficulty in our carrying out the principle laid down by the Court of Queen's Bench in the case of *Lowe v. The London and North Western Railway Company*(a), and in holding, that the learned Judge was right in leaving it to the jury to say whether the defendants had contracted or not.

ALDERSON, B.—I am of the same opinion. By the express provisions of the Companies Clauses Consolidation Act, Railway Companies may be bound by the parol contracts of the directors in cases in which private persons make a valid contract by parol. Here there was abundant evidence from which to infer such a parol contract on the part of the Company to accept the goods on the train made by a person in their employ.

PLATT, B.—I concur in thinking the defendants

(a) 21 L. J., Q. B., 361; ante, p. 524.

rightly found liable. The correspondence after the contract sufficiently shews that the Company were really parties to the contract. In the case of *Homersham v. The Wolverhampton Waterworks Company*(a), there was no evidence that the extra work had ever been ordered, sanctioned, or adopted by the Company.

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MARTIN, B.—The declaration contains two counts. But the only question is, whether there was evidence to go to the jury in support of the first count. The case may be looked at from two points of view. First, what would have been the defendants' position had they been private individuals? If the clerk of an ordinary partnership firm had come to terms for the purchase of goods, and the firm afterwards received and used the goods, could it be contended that there was no evidence for the jury of the adoption by the firm of the terms agreed to by their clerk? I think, in point of law, that the firm would be taken to have adopted the terms; at all events, the jury, under such circumstances, would rightly conclude that they had. Then, secondly, does it make any difference that the defendants are an incorporated public Company? The 97th section of the Companies Clauses Consolidation Act enables the directors or committee of a public Company to contract on behalf of the Company by parol, where private individuals could make a valid contract by parol; and the case of *Lowe v. The London and North Western Railway Company*(b) is a distinct authority, that the fact of the Company having derived benefit from the contract is evidence for the jury that they so contracted. If the decision in that case is wrong, it must be corrected by a Court of error; but, in fact, it does not militate against the previous decisions. In *Homersham v. Wolverhampton Waterworks Company*(a) there was an express contract under seal for the execution of certain

(a) 6 Exch. 137; ante, Vol. 6, p. 790.

(b) Ante, Vol. 7, p. 524; 21 L. J., Q. B., 361.

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works, and the Court held, that they could not assent to an implied contract for other work connected with it without any further evidence. In *Diggie v. The London and Blackwall Railway Company*(a), the evidence established all notion of an implied contract. However, the *Lowe v. The London and North Western Railway Company* establishes, that, under circumstances like those present, it is for the jury to say whether the Company made such a contract; and I found my judgment in that case.

Rule discharged.

(a) 5 Exch. 442; ante, p. 590.

COURT OF QUEEN'S BENCH

Michaelmas Term, 1851.

Nov. 26th. CHIPPENDALE, App., and THE LANCASHIRE AND YORK
RAILWAY COMPANY, Resps.

The plaintiff having some cattle to be carried on the defendants' railway, saw them put into a truck, and on paying for the carriage received and signed a ticket containing at the foot of it the following notice:—
"N. B.—This ticket is issued subject to the

owner undertaking all risks of conveyance whatever, as the Company will not be responsible for any injury or damage, howsoever caused, occurring to live stock of any description upon their railway, or in their carriages." During the journey some of the cattle alarmed and escaped from the truck, owing to its being so defectively constructed as to be dangerous and unsafe for conveying cattle:—*Held*, in an action against the defendants as carriers for the injury so caused to the cattle, that the defendants were protected from under the circumstances by the terms of the ticket; as they were such as to exclude any stipulation that the truck was fit for the purpose for which it was to be used.

APPEAL from the county court of Lancashire, at Wigan. Case:—This is an action to recover damages of 22l. 4s., the amount of damages alleged to have been sustained by the plaintiff (the appellant) in consequence of the negligence and carelessness of the defendants' servants at Wigan, whereby the plaintiff suffered the loss of three heifers, which were all entrusted to the defendants as carriers and for incidental expenses incurred in and about the same. On the trial of the cause in the said Court

the judge and a jury, the following facts appeared in evidence. The plaintiff is a dealer in cattle, and the defendants are common carriers for hire, from, among other places, Wigan aforesaid to Bury, in the said county of Lancaster. On the 28th of May last the plaintiff's drover brought twelve head of cattle to the Wigan Station of the Lancashire and Yorkshire Railway Company, for the purpose of being conveyed upon their Railway to Bury aforesaid, a distance of sixteen miles, and they were driven and deposited by him, with the assistance of the defendants' servants, into a truck provided by the defendants, being one in ordinary use for the purpose of conveying cattle along the line. Before the whole of these cattle were so deposited in the truck, the plaintiff himself brought a heifer down to the station, which in his presence was also driven and deposited in the truck, and the door of the truck was then closed. The plaintiff then went into the Company's office and paid 8s. for the carriage, being after the rate of 6d. per mile for the truck for sixteen miles, and received a free pass for his drover to go by the same train as the cattle, and the plaintiff signed a pass ticket in the following terms:—

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"Lancashire and Yorkshire Railway, District No. 42, Live Stock Department."

No. of Wagon.	Quantity.	Description.	Rate.	Amount paid on.	Paid.	Dr.	Wigan Station, May 28th, 1851.
1520	13	Beasts.	s. d.		s. d.		Name,
	1	Rope.	8 0	One Man's	8 0		William Chippendale.
	1	Rope Net.		Fare.	1 4		Address, Bury,
					9 4		From Wigan to Bury.
							John Hardy, Clerk.

N. B.—This Ticket is issued subject to the owner undertaking all risk of conveyance whatever, as the Company will not be responsible for any injury or damage, howsoever caused, occurring to live stock of any description travelling upon the Lancashire and Yorkshire Railway, or in their vehicles.

(Signed)

WILLIAM CHIPPENDALE.

{ Owner, or on the owner's behalf, agrees to the above terms."

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A duplicate of the ticket was delivered to the plaintiff, which he took with him. On the truck containing the cattle in question reaching the main line the cattle became alarmed, and three of them escaped from the truck, through a space between the close boarding at the lower part of the side of the truck, and a rail which ran round the top of the truck; two of the heifers were killed, and the third was much injured. It was contended, by the plaintiff's advocate, that the defendants were liable, notwithstanding the special contract, as the truck was defectively constructed for the purpose of conveying cattle, by reason of the space between the top rail of the truck and the close boarding being too great. The learned judge held, that the plaintiff, having entered into the special contract as before mentioned, had no ground of action, and that the defendants were not liable for the injuries so occasioned to the cattle; but at the request of the plaintiff's advocate he asked the jury to give their opinion, whether the truck in question was unfit and unsafe for the purpose of conveying cattle along the line, and if they considered that it was so unfit and unsafe, that they should say what damage the plaintiff had sustained. The jury found that they considered the truck in question was so defectively constructed as to be unfit and unsafe for the purpose of conveying cattle along the line, and that they considered that the plaintiff had sustained damage to the amount of 21*l.* 4*s.* The judge directed a verdict to be entered for the defendants. The question for the opinion of the Court of Queen's Bench was, whether the defendants were liable for the damage so occasioned, as the plaintiff had entered into the special contract, as above stated. If the Court of Queen's Bench should be of that opinion, the verdict was to be entered for the plaintiff for the sum of 21*l.* 4*s.*, otherwise the verdict was to stand and remain in force.

Cowling, (Nov. 26), for the appellant (the plaintiff below).

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-The defendants being common carriers are *prima facie* liable at common law for defects in the carriages used for the conveyance of any goods intrusted to them to carry, from which damage has resulted. The truck, on the finding of the jury, was so defectively constructed, as to be unfit and unsafe for the conveyance of cattle, and the injury resulted from this defect. It may be, that the terms of the ticket qualify to a certain extent the defendants' common law liability, but they cannot be construed literally, as if taken to their full extent they would go to exempt the defendants from liability for gross negligence, or even wilful misfeasance. The law will not allow a carrier thus to exempt himself from all liability. The "nota bene" must therefore have a limited and reasonable construction put on it; and the parties must be taken to have contracted on the basis that the truck was fit for its purpose—that would be called "seaworthy," were it the case of a ship; and in the somewhat analogous cases of marine insurance it has been held, that although nothing is said about the seaworthiness of the vessel to be insured, the basis of the contract is the assumption that she is fit for her voyage. *Lyon v. Mells* (a) is in point, where it was held, that, in every contract for the carriage of goods for hire, between the owner of a vessel ready to carry goods and the persons putting the goods on board, it is a term of the contract on the part of the carrier *implied by law*, that his vessel is tight and fit for the purpose for which he offers her. This contract cannot be taken literally, for it is clear that the defendants would be liable notwithstanding for gross negligence. *Garnett v. Willan* (b), *Shaw v. The York and North Midland Railway Company* (c), *Austin v. The Manchester, Sheffield, and Lincolnshire Railway Company* (d) will be cited by the other side:

(a) 5 East, 428.

B. 347.

(b) 5 B. & A. 53.

(d) 20 L. J., Q. B., 440.

(c) Ante, Vol. 6, p. 87; 13 Q.

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but they are distinguishable from the present case. The former case merely decided that the common law liability to carry safely and securely was qualified by terms of ticket something like the present; but the Court did not say how far this qualification extended; and threw out that notwithstanding the special terms the Company might have been bound to furnish proper and sufficient carriage. The latter case turned on a mere point of pleading.

Tomlinson, for the respondents, was not called on.

COLERIDGE, J.—The question here turns on the construction of the *nota bene* on the ticket, which forms the contract between the parties. Now, nothing can well be more general than the terms, “This ticket is issued, subject to the owner undertaking all risks of conveyance whatever, as the Company will not be responsible for any injury or damage howsoever caused, occurring to live stock of any description travelling upon the Lancashire and Yorkshire Railway, or in their carriages.” These words, if taken literally, would certainly exempt the Company in all cases whatever against any risks of conveyance, and all injury, however caused, to the animals while travelling. Mr. *Cowling* says, therefore, that the terms of the ticket cannot be taken literally, and on the authority of the case of *Lyon v. Mells* seeks to introduce as the basis of the contract, a stipulation that the carriage is fit for the journey, or as it were “seaworthy.” Now the case of *Lyon v. Mells*, like the present, was one of construction. Want of ordinary care on the part of the master and crew was there excepted from the risk of the shipper, and it was held by the Court, that it must be inferred from that that want of care on the part of the owner was also to be excepted, and that it was a want of ordinary care on his part not to provide a seaworthy vessel. Now in the present case no such inference can be drawn. Nor is there

anything in the nature of the case which renders it necessary for us to infer such a stipulation. The plaintiff had an opportunity of seeing the truck and judging of its fitness, as he was present when one of the heifers was put into it. Confining myself, therefore, to the circumstances of this particular case, and without laying down any general proposition, I think that the plaintiff could not maintain his action, for that by the terms of the ticket it is to be taken, that the plaintiff undertook all risk whatever of damage to the animals during the journey; and the Company consequently was fully protected under the circumstances which have happened.

ERLE, J.—I think the plaintiff by signing the ticket entered into a contract by which he bound himself not to call upon the Company for any damage accruing as the present did. I take it, the truck was fit to run the journey, and capable of carrying the weight, and that the damage arose entirely from the fact that the freight was live animals, which, on being frightened, made an effort to escape. This seems a risk from which the Company peculiarly exempted themselves; and this exemption, however wide in its terms, seems to me both natural and reasonable, being, as it is, in respect of live stock, for if the animals are at all wild, it would be almost impossible to carry them without injury.

Judgment affirmed.

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Easter Term, 1852

May 10th

THE GREAT NORTHERN RAILWAY COMPANY, Apps, and
MORVILLE, Resp.

The plaintiff took a horse to a station of the defendants, who were common carriers of horses, to be conveyed along their railway: on paying for the carriage he received and signed the following ticket:—
"This ticket is issued subject to the owner undertaking to bear all the risk of injury by conveyance and other contingencies. The Company will not be responsible for any damages, however caused, to horses travelling on their railway or in their vehicles." The horse was injured by a collision on the railway from want of due care, but without any wilful misconduct or gross negligence on the part of the defendants' servants:—

Held, that there was a special contract be-

tween the parties, which was valid under section 6 of the Carriers' Act, 11 Geo. 4 & 1 Will. 4, c. 68; and that the ticket was not a mere public notice within the 4th section of that Act; and that by the terms of the contract the defendants were protected from liability in respect of the injury to the horse.

APPEAL from the county court of Yorkshire, holden at Pontefract. **Case:—**This was an action brought to recover the sum of 27*l.*, the amount of damages alleged to have been sustained by the plaintiff (the respondent) in consequence of the negligence and carelessness of the defendants' (the appellants) servants, whereby the plaintiff's horse was injured. On the trial of the cause by the judge of the county court, without a jury, the following facts appeared in evidence:—The plaintiff Morville is a veterinary surgeon and dealer in horses, residing at Wakefield; and the defendants, the Great Northern Railway Company, are common carriers by railway, for hire, from (among other places) Kirkstead, in the county of Lincolnshire, to Wakefield, in the county of York. On the 14th of August, 1851, the plaintiff, who had been at the Hornsea horse fair, brought a horse which he had then purchased to the Kirkstead station of the Great Northern Railway Company, for the purpose of having it conveyed from thence by railway to Wakefield, and on the arrival of the down train from London it was safely placed and tied up in a horse-box. The plaintiff then went into the Company's office, and paid the charge demanded for the carriage of the horse to Wakefield, and upon such payment, signed, in a book kept by the clerk at the station, a memorandum or ticket in the words and figures following:—

"The Great Northern and East Lincolnshire Railway Company. —Ticket for horses, cattle, sheep, pigs, dogs, and live stock of every description.—No. 71. date, August 15th, 1851. From Kirkstead to Wakefield, one horse, at 19s. 6d.—Paid. This ticket is issued subject to the owner's undertaking to bear all the risk of injury by conveyance and other contingences, and the owner is required to see to the efficiency of the carriage before he allows his horses or live stock to be placed therein; the charge being for the use of the railway carriages and locomotive power only. The Company will not be responsible for any alleged defects in their carriages or trucks unless complaint be made at the time of booking or before the same leave the station, nor for any damages, however caused, to horses, cattle, or live stock of any description, travelling upon their railway or in their vehicles. *I have examined the carriages, and am satisfied with their efficiency and safety.*

(Signed) "JOHN MORVILLE, { Owner, or on the
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The clerk then handed to the plaintiff what he, the plaintiff, understood to be a duplicate of the ticket signed by him in the book, but which did not contain that part in italics relating to the efficiency of the carriages. The duplicate was not signed by the plaintiff; it was identically the same as the ticket signed in the book if that ticket had terminated with the word "vehicles." On the arrival of the train at Knottingley, the horse-box containing the plaintiff's horse within it was detached from the London train, and shunted upon the Wakefield line by the servants of the defendants, in order to be attached to another train proceeding to Wakefield, and in so doing a concussion took place between the horse-box and a truck or carriage on the latter line, which caused the injury, which, on the arrival of the horse at Wakefield, it was found to have sustained. The counsel for the defendants contended, that the accident had not arisen either from gross negligence or misfeasance on the part of the servants, and that the ticket signed by the plaintiff was a special contract entered into by him, disclosing the precise terms upon which the defendants undertook to convey the plaintiff's horse, and that it was a bar to the plaintiff recovering in the action.

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And he cited, amongst other cases, in support of his position, *Austin v. The Manchester, Sheffield, and Lincolnshire Railway Company* (a), and *Chippendale v. The Lancaster and Yorkshire Railway Company* (b). The plaintiff's attorney contended, that the ticket above set forth was only a special contract as to the efficiency and safety of the carriage or horse-box; and that the preceding paragraph did not purport to be, and was not in effect, any contract or agreement whatever between the plaintiff and the defendant, but was a mere notice or restriction of the common law liability of the defendants as carriers, and as such was void under the 4th section of the statute 11 Geo. 4 & Will. 4, c. 68. The judge took time to consider his judgment; and on the 20th day of January last, at Pontefract gave such judgment in favour of the plaintiff, ordering the verdict to be entered for him, and assessing the damages at 21*l.*; but the judge expressly found that the injury done to the horse had not been caused by any misfeasance, wilful misconduct, or gross negligence on the part of the defendants or their servants, but was the result of the want of due care only in shunting the horse-box at Knottingley as above stated. The question for the opinion of the Court of Queen's Bench was, whether the defendant, upon the construction of the said ticket, signed by the plaintiff as above mentioned, and upon the finding of the said county court judge, are protected from their liability to pay for the damage occasioned as above stated. If the Court should be of that opinion, then the verdict was to be entered for the defendants, otherwise the verdict was to stand and remain in force.

Phipson (May 10) for the appellants.—The appellants are not found to be carriers of horses; and therefore, in the present case, they are not liable as carriers, for a

(a) 20 L. J., Q. B., 440.

(b) Ante, p. 824.

such they would only be liable to the extent of their profession: *Johnson v. The Midland Railway Company* (a). But, assuming them to be common carriers of horses, still their liability is governed by the ticket, which amounts to a special contract between the parties, and they are therefore within the exception of the Carriers Act (b). Now it is quite clear that the terms of the ticket protect the Company from all liability for damage done to the horse in the transit, and is not confined merely to the condition of the carriage itself. The 4th section of the Carriers Act does not apply, as the ticket here is not a mere notice but a contract signed by the plaintiff.—He also cited *Austin v. The Manchester, Sheffield, and Lincolnshire Railway Company* (c), and *Chippendale v. The Lancashire and Yorkshire Railway Company* (d).

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Cowling for the respondents.—The case finds that the defendants are common carriers, and that must mean of horses; and moreover, the fact of their taking the plaintiff's horse shews this. It seems to be assumed almost by the other side that this is a special contract between the parties, and therefore within the exception of the 6th section of the Carriers Act. But that it is within that, is not so clear; it is a mere notice by the defendants to all their customers, and therefore void as far as it seeks to limit their common law liability. The contract here is one founded on the general notice to the public. If the law as it stood before the statute, and as affected by that, be looked at, it is manifest when the statute says, (sect. 4)—“that notices limiting the carriers' responsibility shall be void,”—that it contemplates notices that would have had an effect before the Act. Now no notice could have had any effect unless it were brought home to the bailor, and were, in effect, part of the contract.

(a) 4 Exch. 367; ante, Vol. 6,
p. 61.

(b) 11 Geo. 4 & 1 Will. 4, c. 68,
s. 6.

(c) 20 L. J., Q. B., 440.

(d) Ante, p. 824.

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When the statute therefore says that no notice limiting their liability shall be valid, it means no notice which, by being brought home to the knowledge of the parties, became part of the contract. The ticket, therefore, here is a mere notice, and as such invalid to relieve the defendants from their responsibility as carriers incurred under the circumstances of the case. This distinguishes the cases cited for the appellants, for this point was not taken in them.

COLERIDGE, J.—I am of opinion that the verdict given in the Court below was wrong; and that the defendants are entitled to succeed on this appeal. It may well be, that Railway Companies may restrict their business so as to be common carriers of some articles, and yet not of cattle. It is unnecessary to give an opinion on that, as I think enough appears in the case to induce us to treat the present defendants as being common carriers of horses. They are then within the Act of Parliament. But the appellants say there was a special contract within the 6th section; and on the other hand it is urged for the respondent, that the ticket is not a contract in itself, but that all the contract that exists is what may legally be inferred from the notice in the ticket. And it is contended that the notices contemplated in the 4th section of the Act can only be such as would have been available before the Act, by being brought here to the knowledge of the person sending the goods, from which knowledge assent was to be inferred, and from assent a contract: and that the Act clearly contemplated a distinction between mere notices and contracts mentioned in the 6th section. But the notices mentioned in the 4th section are "public" notices: that is I think such notices as are mentioned in the preamble, viz notices published by the carrier: whereas sect. 6 refers to contracts made by the parties when they came together. And I think this present case clearly comes within this latter class. The plaintiff brought his horse to the station, pays the carriage for it, and receives from the clerk a ticket; whether the plaintiff

signs it or not is immaterial, if he agrees to its terms; and it is quite clear that in the present case he did, for he put his signature to them. There was therefore a special contract, and the Company by its terms is exempted from liability.

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ERLE, J.—It must be perfectly clear that the defendants undertook to carry the horse on the terms that they should not be responsible for any damage occurring in the journey. The consideration for the plaintiff's entering into this agreement was the carriage of the horse by the defendants on the payment of the carriage. It is immaterial whether the plaintiff signed the terms, or whether the clerk mentioned them, or delivered a ticket to the plaintiff containing them; in either case there would have been evidence of a contract between the parties. The notices referred to in the 4th section of the Carriers Act are general notices to the public. It was provided by that section, that "public" notices should no longer be of any avail, in order to obviate the question which was perpetually occurring, whether such public notices had been brought home to the party sending the goods. That section has no connection with the 6th section, which leaves it open to a carrier to make what special contract he pleases with individuals. Assuming therefore the defendants to be common carriers of horses in the widest sense, I think that there was a special contract within the 6th section, and that the defendants were protected by it.

Appeal allowed.

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*Easter Term, 1852.**April 21st.* REGINA v. THE DOCK COMPANY AT KINGSTON-UPON-HULL

The Hull Dock Company are the owners and occupiers of several docks and basins (constructed under various Acts of Parliament), which communicated with each other, but are situate in several parishes. By the various statutes, the Company is empowered to charge certain tonnage duties on every ship entering or going out of the harbour, basin, or dock within the port of Hull, or unlading, or lading any of its cargo within the port, to be paid on the entrance of the ship inwards or on its clearance outwards. The same duties are payable into whatever dock the ship enters, and whether it use only one or more of the

separate docks or basins; such duties becoming payable as soon as the ship enters any one of the docks:—*Held*, that, in assessing the Company to the poor-rates, the entire rateable value of the whole of the docks should be ascertained, and then divided among the several parishes within which the docks &c. are situate, in proportion to the area of the docks in each parish.

ON an appeal to the Midsummer Quarter Sessions, 1851, for the borough of Kingston-upon-Hull, by the Hull Dock Company, against a rate for the relief of the poor of 1s in the pound, assessed upon them in respect of their docks, situate in the united parishes of Holy Trinity and St. Mary in the said borough, the recorder confirmed the rate, with costs, subject to the opinion of this Court upon the following case:—The appellants are the owners and occupiers of the docks and basins, hereinafter more particularly mentioned, situated at the port of Kingston-upon-Hull, which previously to the construction of the oldest of the said docks was an ancient port formed by the river Hull, a part whereof, adjoining the town of Kingston-upon-Hull, is known by the name of the Old Harbour. The Old Harbour extends from a place formerly called Sculcote Gate to the mouth of the river, and is vested in the mayor, aldermen, and burgesses of the borough, who receive considerable dues in respect of vessels using the port. In 1774, by the stat. 14 Geo. 3, c. lvi., s. 17, the appellants were incorporated as “The Dock Company at Kingston-upon-Hull;” and by sect. 15 the Company were empowered to make the dock now called “the Old Dock,” most of the north part of which is in the parish of Sculcoates, and the south part is in the parishes of Holy Trinity and St. Mary. By sect. 22 the Company were from time to time well and sufficiently to repair, maintain, support, and cleanse the said dock, and certain other

works in the said Act mentioned, and by them to be provided by virtue of the Act. By sect. 25 the said docks and the works connected therewith were vested in the said Company. By sect. 42, in consideration of the great charges and expenses of making the said docks and works, and keeping the same in repair, certain rates or duties of tonnage were granted to the said Company for every ship or vessel (the King's ships of war, and ships employed in his Majesty's service, only excepted) coming into or going out of the said harbour, basin, or dock, within the port of Kingston-upon-Hull, or unlading or putting on shore, or lading or taking on board any of their cargo, or any goods, wares, or merchandise within the said port, for every ton a certain sum of money, varying in amount as in the said section is mentioned, according to the ports or places therein specified, between which and the port of Hull the said vessels might come or go, or trade; which said rates or duties were vested in the said Dock Company as their own proper monies; the time at which these rates or duties were directed to be paid is pointed out in the following terms—"and shall be paid at the time of such ship's or vessel's entry inwards, or clearance or discharge outwards; or in case any ships or vessels shall not enter as aforesaid, then at any time before such ships or vessels shall proceed from the said port, at the custom-house in the said port, so as no ship or vessel shall be subject or liable to the payment of the said rates or duties, or any of them, more than once for the same voyage, both out and home, notwithstanding such ship or vessel may go out and return with a loading of goods or merchandise." By sects. 46 to 52 provisions are made for the measurement of the ships and collection of the duties. Sect. 53 appoints a general annual meeting of the Company to be held, at which all accounts of receipts and disbursements are to be audited and settled, and at which a dividend may be declared; and it also directs that the treasurer shall prepare a general account of such re-

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ceipts and disbursements, and of the dividend declared, and shall cause the same to be printed and delivered to the subscribers. By sects. 67 to 70 the guild or brotherhood of the Trinity-house of Kingston-upon-Hull are empowered to appoint a dock-master and assistants, with full power and authority to direct the mooring or removing of all vessels coming into, lying, or being in the said basin or dock, or elsewhere within the said port or haven. The dock now called the Old Dock, with the quays and works mentioned in this Act, was constructed within the statutory time. The entrance into this dock from the Old Harbour was through its basin, situate in one of the respondent parishes. The liability of the appellants to be rated in the parish of Sculcoates for so much of the said dock as lies in that parish was established in the Court of King's Bench in 1786 (a). The stat. 42 Geo. 3, c. xci, s. 1, (A.D. 1802), for making additional basins or docks at Kingston-upon-Hull, recites the before-mentioned Act and its provisions generally, and by sect. 5 it authorised and required the "said Dock Company" to make the "Humber Dock" and Basin; and by sect. 6 it is enacted, "that the said recited Act, and all and every the rates and duties, powers, authorities, provisions, regulations, clauses, penalties, forfeitures, matters, and things therein and thereby given, granted, vested, levied, or to be executed (except so far as the same or any of them are by this present Act enlarged, diminished, altered, qualified, or otherwise explained), shall be, and they are hereby declared to be, in full force, as well in regard to the said additional basin or dock, and other works hereby directed or intended to be made, and for effecting all other the purposes of this present Act, as for the purposes of the said recited Act, in as full, large, ample, and beneficial a manner, to all intents and purposes, as if the same were expressly repeated and re-enacted in the body of this present Act."

(a) See *Rex v. The Dock Company of Hull*, 1 T. R. 219.

By sect. 41 the Dock Company are to support and cleanse the Humber Dock. Sect. 56 gives power to purchase land for a third dock, to meet the probable wants of the port. In 1805, by the stat. 45 Geo. 3, c. xlii., which was an Act to authorise the raising of money for carrying into execution the powers of the last-mentioned Act, the docks and basins by the said last-mentioned Act directed to be made are by sect. 10 declared to have extended to them the same rights and privileges which then belonged to the port of Kingston-upon-Hull: and it was thereby declared, that they should, to all intents and purposes, be deemed and held to be part of the said port of Kingston-upon-Hull; and it was also thereby declared, that all vessels entering into or loading or unloading in the said docks or basins, and all goods, merchandise, and other things which should be loaded or unloaded in or pass through the same, should be subject to the several regulations and be liable to the several duties to which they were or had been subject or liable in the port of Kingston-upon-Hull. After this statute was passed, the Humber Dock and Basin and (after an interval of about twenty years) the Junction Dock were completed, according to the provisions of the two last-recited Acts. In 1844 the stat. 7 & 8 Vict. c. ciii. was passed, which, after reciting the 14 Geo. 3, c. lvi., the 42 Geo. 3, c. xci., and the 45 Geo. 3, c. xlii., and that it would be expedient that the "said Company" should be authorised to make certain additional docks, it is enacted (sect. 1) that the said recited Acts, and all and every the provisions, rates, matters, and things, of what nature or kind soever, therein respectively contained (except as varied or altered by any of the said Acts or that Act), "shall be, and they are hereby declared to be, in full force and effect, as well in regard to the present docks as the said intended new docks and quays, and all other the works to be made by virtue of and under this Act, and shall extend to this Act, and shall be in force with respect to this Act, as effectually as if the same were re-enacted in this Act;

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and the said several recited Acts construed together as one Act." By empowered to borrow money, to be the rates and duties arising by Acts and this Act," or by bond. accounts are to be kept of all so expended on account of the Com directors, and of the articles, mat such sums of money shall have b and paid. And sect. 67 directs, t out yearly, by the secretary, of tl receipts and disbursements of the allowed at the annual meeting year; and it declares that such co tary, shall be transmitted to the borough of Kingston-upon-Hull, i spection. By sect. 166 it was mad to construct a new dock on the eas Kingston-upon-Hull, and also a l ern side of the Humber Dock, an way terminus. By sect. 191 it docks, and the works respecti should be deemed to be in and w port of Kingston-upon-Hull. By "that no vessel passing up or down out entering any of the docks, b commencing or terminating her Hull, shall be subject to the tonn said recited Acts, or any of them load or discharge any part of her the river Humber which is within that event, such tonnage rates sh only in respect of the quantity of charged by such vessel." By sect no vessel passing up or down the place above the beer-houses there

the docks or basins, shall be subject to the said tonnage rates, unless such vessel shall load or discharge any part of her cargo within the Old Harbour, or within that part of the river Humber which is within the port of Hull; and in that event, such tonnage rates shall be payable and paid only in respect of the quantity of goods so loaded or discharged by such vessel." By sect. 200 it is enacted, "that, if any vessel using the docks, whether the same shall have previously paid or been liable to tonnage rates or not, shall remain in the docks, or any of them, for a longer space of time than ten months, to be computed from the time of going into the dock or docks, there shall be paid and payable to the Company by the master or owner of every such vessel, according to the tonnage or burden thereof, a further rate of one halfpenny per ton for every week during which any such vessel shall remain in the said dock or docks beyond the said period of ten months, in addition to the rates or duties of tonnage payable by virtue of the said recited Acts." By sect. 202 it is enacted, "that the several rates authorised to be taken by the recited Acts and this Act shall at all times be charged equally, and after the same rate, in respect of the same description of vessel and same descriptions of goods upon the same voyage: provided always, that a vessel proceeding from the said port of Hull to any other port or place and returning from such port or place to Hull, and a vessel first proceeding from any other port or place to Hull and returning to such other port or place, shall be considered as performing the same voyage." By sect. 232 a dock and haven master is to be appointed by the guild or brotherhood of the Trinity-house in Kingston-upon-Hull, with proper assistants; and by sect 237 the dock and haven master and his assistants have power to regulate the position, mooring, unmooring, berthing, placing, or removing, within the said haven and docks, or any of them, of any vessels entering into, lying in, or going out of the same respectively, subject to the control of any bye-laws

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to be made by certain commissioners in and by the said Act named and appointed. And by sect. 238, whenever the dispatch of business shall be obstructed by reason of any vessel lying in the said docks, whether the cargo of any such vessel shall or shall not have been discharged, it shall be lawful for the dock and haven master and his assistants (but subject to the control of any such bye-laws as aforesaid) to remove any such vessel from any one of the said docks into any other of the said docks into which the vessel can be removed without being taken into the river Humber. By sect. 250, vessels, after being discharged of their cargoes, are to be removed into such part of the docks as shall be set apart for light vessels.

Under the powers and provisions of this Act, a branch dock, the dock now called the Railway Dock, has been completed at the western side of the Humber Dock, and to the north of the railway terminus, and was opened on the 4th of December, 1846: and the dock on the eastern side of the citadel, now called the Victoria Dock, with its basin, communicating directly with the Humber, has also been completed, and the same was opened on the 3rd of July, 1850. All the docks on the west side of the river Hull communicate with each other, and also with the river Humber to the south, through the Humber Dock Basin, and with the river Hull or Old Harbour to the east, through the Old Dock Basin. The Victoria Dock, which is on the east side of the river Hull, communicates, through its basin, with the river Humber to the south, and it is also intended, and by the last recited Act required, to communicate with the river Hull or Old Harbour to the west, by means of a cut or communication, which is not yet completed, but which is in the course of construction, and is expected to be completed in about a year. Upon the completion of that cut or communication, vessels entering the Victoria Dock Basin from the Humber will be able to pass through and use all the docks, and to return into the Humber by the Humber Dock

basin or vice versa. At present, vessels entering the Humber Dock Basin from the Humber can pass through all the docks except the Victoria Dock into the river Hull, and through that river into the Humber, or vice versa. The Dock Company maintain and repair all their docks and works, and in making such repairs their workmen are employed, and their materials, of which they have always a large stock in their yards of works, are used therein indiscriminately. No separate or distinct accounts are kept for the several docks, the whole of the expenditure in maintaining and keeping them in repair being carried to one general account; although, so far as the Victoria Dock is concerned, its complete construction, at the time of its opening in July, 1850, rendered repairs unnecessary at the time of laying the rate now appealed against. There is only one set of officers to superintend the entire establishment of the docks (with the exception of inferior officers and servants for each separate dock), and the duties of the dock master extend equally over all the docks, but his assistants are assigned to separate docks. There are no distinct or separate rates or duties of tonnage payable to the Company for the use of any particular dock or docks, or of the Old Harbour, or any accumulative rates or duties for the use of all or any number of them, but the same rates and duties of tonnage, both in description and amount, are payable, into whatever dock vessels may go, and whether they use only one dock, or use more of or all the docks, and whether they do so use the Old Harbour or not. By the above-mentioned statutes, such duties attach and are payable as soon as the vessels enter any of the docks or Old Harbour. It is frequently the case that vessels on the same voyage use two or more of the docks; but whatever number of docks they use, they pay only one rate or duty. No additional charge can be made for a vessel taking on board her cargo, on her voyage outwards, in the said docks or Old Harbour, or any of them, and discharging her cargo, on her voyage inwards,

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in the same or the other docks and Old Harbour, or any of them, or vice versa; but the Company can claim the duties or rates on the vessels at the time of leaving the Old Harbour or any dock on her voyage outwards, or upon her return home afterwards into the Old Harbour or any one of the docks into which she may enter. A list was put in evidence by the respondents, wherein forty-one vessels had used both the eastern and the western docks, with or without the Old Harbour, in a similar manner, on the same voyage. In thus using several docks on the same voyage, the shipowners are governed entirely by their own convenience as to which they will use first—first using sometimes the eastern docks, sometimes the western, sometimes the Old Harbour. Tonnage dues are received for vessels using the Old Harbour only; and since the decision of this Court in the case of *Reg. v. The Dock Company of Hull (a)*, that the Dock Company are only rateable to the relief of the poor for the dues paid by vessels which come into and use any of their docks, and not for the dues paid to them by vessels which enter the port or use the Old Harbour, but do not enter or use any of the docks, a separate account of the dues paid by the latter description of vessels has been kept. A separate account could be kept of the vessels using the Victoria Dock alone, or of vessels which leave that dock, or which enter it with goods laden, when the dues would first attach. No account is kept of the amount of dues received from vessels using more than one dock, or which use the Old Harbour conjointly with any one or more of the docks. The same rates attach whether the vessels use one or more of the docks, and can be claimed as soon as they enter any of the docks. The further tonnage dues payable for vessels remaining more than ten months in the docks have always been payable generally, and without regard to the question, whether such

(a) 7 Q. B. 2.

s within that period have remained within one particular dock or set of docks. But by the above-mentioned Act, 7 & 8 Vict. c. ciii. s. 200, these further tonnages are charged at the rate of one halfpenny per ton per week for every week during which any vessel shall remain in said dock or docks beyond the period of ten months. It was admitted by the appellants, that the sum of 525*l.* might be taken as the amount of tonnage dues received by the appellants in respect of vessels which had used the Victoria Dock and Basin alone, from the opening of their docks in July, 1850, to the end of that year, without having entered or come upon the soil of any of the appellants' other docks or works, or of the Old Harbour; and it was proved that that sum was the amount of dues chargeable upon vessels which had used that dock only during the time mentioned. It was also proved, that the amount of dues received for vessels which have used the Victoria Dock and some of the other docks, is greater than the amount of dues received for vessels which have used the Victoria Dock alone, exclusive of the harbour. It was further admitted, that the area of the docks and their respective basins situated within the parishes of Holy Trinity and St. Mary, consisting of the greater part of the Old Dock and all its basin, the whole of the Junction Dock, the Railway Dock, and the Humber Dock and basin, contains 4339 perches; that the area of the Old Dock, within the parish of Drypool, contains 612 perches; and that the area of the Victoria Dock and its basin, within the parish of Drypool, contains 724 perches, and within the place alleged by the appellants to be extra parochial, and called the Garrison Dock, 1769 perches. The net rateable value on which the appellants were rated in the rate appealed against had been calculated as follows:—From the gross receipts of the appellants in respect of all their tonnage dues, according to their own valuation, for the use of all or any of their docks or the Old Harbour, were deducted, first, the proper deductions usual

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in such cases, and then the amount of tonnage dues received in respect of vessels using the Old Harbour only. The balance, after making these deductions, was then divided into two parts, in the proportion which the area of the docks and basins situate within the parishes of Holy Trinity and St. Mary bears to the area of that part of the Old Dock which is situate within the parish of Sculcoates; and from the amount of this proportionate sum in respect of the area of land in the parishes of Holy Trinity and St. Mary, the sum of 525*l.* was deducted for tonnage dues in the Victoria Dock only. The appellants were assessed, in the rate appealed against, upon the balance thus ascertained. For about twenty years before the construction of the Victoria Dock and the Railway Dock, under the recited Act of the 7 & 8 Vict. c. ciii., the rateable value of the appellants' docks and basins was apportioned between the respondent parishes and the parish of Sculcoates, in proportion to the areas occupied in each by the docks and basins situate therein respectively; but, on the hearing of this appeal, it did not appear in evidence upon what ground this arrangement for apportionment had been made. The appellants contended that the entire rateable value of all their docks and basins, including the Victoria Dock and Basin, ought to be taken jointly, and then apportioned among the several parishes and places within which the same docks and basins are respectively situated, in proportion to the areas of such docks and basins respectively within such parishes and places. The respondents contended that both the rateable value and the area of the Victoria Dock and Basin ought to be excluded in calculating and apportioning the rateable value of the docks and basin situated within the parishes of Holy Trinity and St. Mary. It was agreed that no other objection or question, whether of form or substance, should be taken or raised by either side in the said appeal. The Court of Quarter Sessions held, that the principle contended for by the respondents was right. If the Court should be

of opinion that the principle of rating contended for by the respondents was wrong, the order of sessions and the rates were to be amended according to a calculation stated in the case; otherwise the order of sessions and the rates were to be confirmed.

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Watson and Archbold (April 21), in support of the order of sessions, contended that the assessment was to be calculated on the parochial earnings principle, and cited *Reg. v. The Hull Dock Company*(a), *Reg. v. Kingswinford* (b), *Rex v. Woking* (c), *Reg. v. The Cambridge Gas Company*(d), and *Reg. v. The London and South Western Railway Company* (e).

R. Hall and *T. Campbell Foster*, contra, were not called upon.

LORD CAMPBELL, C. J.—I am of opinion that our decision must be in favour of the appellants. The former decisions in the cases of *Rex v. The Dock Company of Hull* (f) and *Reg. v. The Hull Dock Company* (a) afford us no assistance in the present case, because in both the only question was the rateability of the subject-matter, and no question was raised as to apportionment of the rates among the parishes in which the profits were earned. This Court has adopted what is called the parochial earnings principle in cases like the present, where such a principle is applicable; but can it be adopted in the present case, where the profits are derived from the use of all the land, situate in different parishes? I think it cannot; and, if not, the only principle, as it seems to me, that is applicable, is that of acreage. There is but one source of profit,

(a) 7 Q. B. 2.

(b) 7 B. & C. 236.

(c) 4 Ad. & E. 40.

(d) 8 Ad. & E. 73.

(e) 1 Q. B. 558; ante, Vol. 2, p. 629.

(f) 1 T. R. 219.

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and though it lies in different parishes, yet the profit is derived indiscriminately in all the parishes; and all we can, therefore, look to is, how much of the whole lies in each parish. The tolls are paid in respect of the use of the land in all the parishes, and though they may be received in one particular parish, the land in the others is as much the meritorious cause of the profit as the land in the particular parish. In the case of a railway, the toll is paid for the liberty of travelling over a particular portion of the line, and the passenger has no right over the other part by reason of the payment; but here, on the payment of one toll, the person paying has a right to use any one of the other docks as much as the one into which his ship first entered. I think, therefore, that the appellants' view is the right one.

WIGHTMAN, J.—The Court would adopt the parochial earnings principle, in conformity with former decisions, where the subject-matter admits of its application; but in the present case it is wholly inapplicable. The different basins in the several parishes form but one dock, though it is thus subdivided; and but one toll is payable for entering the dock and the privilege of afterwards using any part of it. It is quite impossible to apply the parochial earnings principle to such a case. It is in effect the same as if the whole area were covered with water and formed but a single basin in different parishes, and toll were paid in respect of the use of any part of it.

ERLE, J.—The whole of the docks form but one rateable subject-matter, and one toll is paid for the use of all or any of the basins; therefore the rateable value must be apportioned to each parish, in the ratio of the quantity of land in each parish. In *Reg. v. The Hammersmith Bridge Company* (a), the tolls were paid for the use of the

(a) 15 Q. B. 369.

whole bridge; and half of the bridge being in one parish and half in another, it was held that the Company were to be rated in an equal sum in the two parishes upon the whole net profits. The same principle must apply here.

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CROMPTON, J.—The toll is not earned by the entry of the ship into the first dock, it is paid for the liberty of using any or all of the docks: therefore, the parochial earnings system is not applicable; and the only applicable principle is that of the acreage.

Rate to be amended accordingly.

Michaelmas Term, 1852.

REGINA v. THE NORTH AND SOUTH SHIELDS FERRY
COMPANY.

June 5th &
Nov. 11th.

UPON an appeal to the Quarter Sessions of the county of Northumberland against a rate for the relief of the poor in the township of North Shields, in the parish of Tyne-

A Company was incorporated by Act of Parliament, and empowered to establish

and maintain a ferry over the public tidal and navigable river Tyne; to take lands and erect ferry houses and landing places on either side of the river, and to receive certain tolls for the passage of the ferry. The landing places on either side were in the parishes of North and South Shields respectively; but the ferry boats, when working, were always afloat and in the parish of N.; and they varied their course in crossing according to the state of the tide &c. The tolls (which were the only profit derived by the Company from the ferry and landing places) were collected at the South Shields landing place. The Company having been assessed to the poor rates in the parish of South Shields "as occupiers of a ferry, landing, and tolls," at one-half the entire net profit of the tolls, on appeal from that rate—*Held*, first, that the tolls could not be directly rated as landed property from their connection with the landing places, nor indirectly by laying the rate on the landing places and treating the half of the entire net proceeds of the tolls as the direct profit of each landing place; and that, therefore, the rate could not be supported.

Secondly: That, in rating the landing places, the tolls should not be entirely excluded from consideration; but that the landing places should be rated as land rendered more valuable by being available for the purposes of earning the tolls.

Held, also, that the mileage principle was not applicable, so as to assess a portion of the profits on the two landing places according to the proportion which their dimensions bore to the length of the transit over the river.

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mouth, wherein the appellants (the North and South Shields Ferry Company) were rated as "occupiers of a ferry, landing, and tolls," the Court of Quarter Sessions confirmed the rate, subject to a case.

The substance of the case is set out in the judgment of the Court. The question for the opinion of the Court was left by the Sessions thus:—

"If the Court of Queen's Bench should be of opinion that the landing place and tolls ought to be rated at 531*l.*, then the order of Sessions was to be confirmed; but if the Court should be of opinion that the landing place alone ought to be rated at 72*l.*, then the order of Sessions and rate were to be amended by striking out the words 'and tolls,' and reducing the rateable value of the landing place from 531*l.* to 72*l.*

Pashley and *Otter* (June 5th) argued in support of the order of Sessions; and *Temple* and *Heath* contra.

The arguments are sufficiently stated in the judgment. The following cases were cited in the course of the argument:—*Peter v. Kendal* (a), *Reg. v. Leith* (b), *Rex v. Tynemouth* (c), *Rex v. Macdonald* (d), *Rex v. Nicholson* (e), *Williams v. Jones* (f), *Rex v. Snowdon* (g), *Rex v. The Mersey and Irwell Navigation Company* (h), *Rex v. The Aire and Calder Navigation Company* (i), *Rex v. Ellis* (k), *Rex v. Barnes* (l), *Reg. v. The Hammersmith Bridge Company* (m), *Reg. v. The Marquis of Salisbury* (n), *Rex v. The Proprietors of the Liverpool Exchange* (o), *Reg. v. Guest* (p), *Rex v. The New River Company* (q), *Rex v. The Corporation of Bath* (r), *Rex v.*

(a) 6 B. & C. 703.

(b) 1 E. & B. 121.

(c) 12 East, 46.

(d) Id. 324.

(e) Id. 330.

(f) Id. 346.

(g) 4 B. & Ad. 713.

(h) 9 B. & C. 95.

(i) 3 B. & Ad. 139.

(k) 1 M. & Selw. 652.

(l) 1 B. & Ad. 113.

(m) 15 Q. B. 369.

(n) 8 A. & E. 716.

(o) 1 A. & E. 465.

(p) 7 A. & E. 951.

(q) 1 M. & Selw. 503.

(r) 14 East, 609.

Bell (a), *Rex v. Coke* (b), *Rex v. Fowke* (c), *The Attorney-General v. Jones* (d), *Reg. v. Bilston* (e), *Reg. v. Working* (f), *Rex v. The Leeds and Liverpool Canal Company* (g), *Reg. v. The Hull Dock Company* (h), and *Reg. v. The London and South Western Railway Company* (i).

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Cur. adv. vult.

LORD CAMPBELL, C. J. (Nov. 11), delivered the judgment of the Court (k).—The appellants were rated to the relief of the poor in the township of North Shields, in the parish of Tynemouth, as occupiers of a “ferry, landing, and tolls;” and the Quarter Sessions for the county of Northumberland, on appeal, confirmed the rate, subject to a case for the opinion of this Court.

It appeared, that, by the 10 Geo. 4, c. xcvi., the appellants were incorporated and authorised “to establish, keep, and maintain a ferry, consisting of one or more steam or other boat or boats, barge or barges, float or floats, raft or rafts, or other vessels, for the conveyance and passage of horses, carriages, foot-passengers, goods, &c., over and across the river Tyne, between North Shields, in the county of Northumberland, and South Shields, in the county of Durham, and to erect ferry houses and proper offices on each side of the said river for the habitation and use of the ferrymen having the care and management of the ferry so to be established, and for the convenience of persons using the same, and to make and keep in repair proper causeways at the landing places of the said ferry so to be established, on

(a) 5 M. & Selw. 221.

(b) 5 B. & C. 797.

(c) Id. 814, n.

(d) 1 Mac. & G. 574.

(e) 5 B. & C. 851.

(f) 4 A. & E. 40.

(g) 5 East, 325.

(h) 7 Q. B. 2.

(i) 1 Q. B. 558; ante, Vol. 2, p. 629.

(k) Lord Campbell, C. J., Coleridge, J., Erle, J., and Crompton, J.

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each side of the said river," and all persons were to have liberty to pass the said ferry on payment of certain tolls granted by the Act. By sect. 4, the Company were empowered to make a road on the north of the river Tyne, from the new ferry to be established to the main street of North Shields; and another road on the south, from the ferry to the main street of South Shields. The Company are restrained from deviating from the line of the roads in the plan of reference without consent of the owners. By sect. 8, the Company are empowered, with the consent of the owners, at any time thereafter, to alter or widen the roads, or to make new roads, with consent of the owners of the lands. By subsequent sections, the Company are empowered to purchase and take any lands necessary for the purposes of the Act, or any ferry or ferries across the river Tyne. A capital of 9950*l.* was to be raised before the powers of the Act were to be put in force. By the 70th section the Company were empowered, as soon as the ferry should be made fit for the passage of carriages, passengers, portable articles, &c., to collect and receive, before any carriages, horses, cattle, passengers, or portable articles, &c., should be permitted to pass over the ferry, or through any gate to be erected by virtue of the Act across the approaches to the said ferry, certain tolls specified in the Act, and which were to be paid every time of passing or re-passing.

The river Tyne, between the two townships of North Shields and South Shields, is a public tidal and navigable river. All the bed of the river below low-water mark is in the parish of St. Nicholas, in the borough and county of Newcastle-upon-Tyne. The shore on each side, when left dry, is in the townships of North and South Shields respectively: but all vessels and things afloat anywhere on the river are in the parish of St. Nicholas.

The Company, under the powers of the Act, raised the required capital, and purchased a piece of land, about fifty yards long and five or six yards wide, in the township of

North Shields, and made the same into a landing place or approach communicating with and leading into the main street of North Shields; and they also purchased a similar piece of land in South Shields, of which they made a similar use; and on each of these landing places they erected a toll-house and gate. They purchased three or four steam ferry boats at a cost of 5000*l.*, and have kept up the same ever since. They also bought from the Dean and Chapter of Durham an ancient ferry over the Tyne. They began in 1830 to work their ferry with the steam boats, and have since that time worked it, and taken tolls, according to the Act of Parliament. The ferry boats, when working, are always afloat, and in the parish of St. Nicholas. The Company, by the consent of the corporation of Newcastle, have erected at each of the landing places moveable platforms, so arranged as to enable passengers, cattle, &c. to embark on the steam boats in all states of the tide. The boats do not pursue the same track in crossing, but vary in their course according to the state of the tide and other circumstances. For the first few years the tolls were collected on the North Shields landing place; they were afterwards collected for a short time on board the boats; but at the time when the rate in question was made, and for several years previously, they were collected at the South Shields landing place.

The ferry, landing, and tolls were rated in the rate in question at 531*l.*, the Sessions finding that the net annual profit of the tolls was 1062*l.* The gross yearly amount of the tolls appeared to be 3570*l.*, from which the Sessions deducted, for working expenses, wages, stores, &c. 1637*l.*; for average repairs, 757*l.*; and for contingent or casual average expenses, 114*l.* The balance, 1062*l.*, they found to be the net annual profit of the tolls, and they assessed one-half of that sum upon the appellants as the rateable value of the ferry, landing, and tolls, in the respondent township.

The appellants derive no profits from the ferry or land-

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ing-places, except the said tolls. The Sessions found that the net annual rateable value of the said landing place in North Shields, without taking the tolls into account, was 72*l.* (a).

The questions raised before us in the argument were—first, whether the principle upon which the rate is laid at 53*l.* is correct; and, secondly, whether the rate ought to be laid upon the landing place only, at the sum of 72*l.*

It was contended, on behalf of the respondents, that the occupation by the Company of the landing places made the tolls rateable; and, secondly, that, at all events, the landing places are not rateable merely for their net rateable value, independently of and unconnected with their value as enhanced by their being available for the purposes of the ferry and of earning the tolls.

On the first point it was contended, that, though tolls are not rateable per se, yet that they became so in the present instance by being connected with real property occupied in the township for the purpose of earning such tolls. To support this rate upon the half of the entire net proceeds of the tolls, it must be made out, either that the tolls can be directly rated, as ceasing to be incorporeal and being landed property, on account of their connection with the landing places occupied by the appellants; or that they can be indirectly rated, by the rate being put upon the landing places as land enhanced in value by the amount of the entire net profit of the tolls.

When tolls are attached to and appurtenant to manors or lands, they are rateable as land; and when they really arise

(a) The Sessions also found in this part of the case, that no tolls would be paid for persons, &c. coming merely on the landing places, unless they were conveyed across the ferry; also, that no person, &c. could use the ferry

without the landing places for embarking and disembarking; and that the ferry was of no value without the landing places or approaches, which were in the occupation of the appellants.

from the use of lands, as in the cases of canals, bridges, railways, or the pipes of water companies, though not rateable per se, they may, after the proper deductions, be treated as the direct profits of the lands which are used in, and are the real cause of, the earning of the tolls.

We do not think, that, in the present case, the ferry and tolls can be treated as appurtenant to the landing places, so as to become part of the land. By the Act of Parliament, a Company is established and incorporated for the purpose of setting up a ferry across the Tyne, which is to consist of one or more steamers or other boats, which were bought and kept up at great expense; and the powers of taking lands for the approaches to the main street of the town, for houses for the accommodation of the ferry-men, and for landing places, seem, by the Act, to be given as convenient and necessary for the ferry, and as incident and accessory thereto; and we find nothing in the Act to make the ferry or the tolls appurtenant to, or annexed to, the landing places, or either of them, in the one township or the other, so as to make them accessory to the landing places; which seem, on the contrary, rather to be accessory and incidental to the incorporeal franchise which it was the object of the statute to create.

Nor do we think that the tolls can be indirectly rated by laying the rate upon the landing places, and treating the half of the entire net proceeds of the tolls as the direct profit earned by the use of each landing place.

The tolls are not the direct profit arising from the landing places, as in the case of canals, bridges, railways, or the mains and pipes of water companies: but they arise principally from the large capital employed in the boats, and from the transit of the boats, not over the land in question, but over a tidal river entirely situate in another township. We do not think that the authorities establish that tolls become rateable, directly or indirectly, by reason of some portion of land being used, although necessarily used,

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in the earning of the tolls. When the use of the land is so small a part of the consideration for the tolls, it would manifestly be unfair to throw the whole burthen on the small portion of land. In the case of canals, the profits may be said to arise mainly from the occupation of the whole line of land covered with water occupied by the Canal Company, and along which the transit takes place. And this is said by *Bayley, J.*, in *Rex v. Nicholson* (a), to be the ground of rating canals in respect of their tolls. So, in the case of bridges, the whole profit arises from the bridge attached to the freehold and part of the freehold. The same observation applies to the mains and pipes of the water companies, and the principle has been applied to the lines of railways, though great difficulty has arisen in so applying this principle to the lines of Railway Companies conducting their business as carriers, and not merely as persons entitled to take tolls on a public line of road. Still, however, even in the case of railways, the profits may be said to arise mainly from the use of the line occupied by the Companies as real property.

If the mere use of any land conducive to the earning of the tolls would make the tolls rateable, either directly or indirectly, as contended for by the respondents, it is difficult to see why the tolls were not rateable in the case of *Rex v. The Aire and Calder Navigation Company* (b), by reason of the use of the dam, which was absolutely essential for the purposes of the navigation. So, in the case of *Rex v. Tynemouth* (c), though the lighthouse was rateable property, the tolls did not therefore become rateable. We agree with what is said by *Bayley, J.*, in *Rex v. Tynemouth* (d), where, in answer to the case put of a toll for the use of a mooring post affixed to the freehold, he says, "the rate in such case would be upon the post"—that is, not on the tolls.

Assuming, then, that the rate is really, in the present in-

(a) 12 East, 330. (b) 3 B. & Ad. 139. (c) 12 East, 46. (d) *Id.* 49.

stance, to be made upon the landing place as land, just as it is intimated, in the case of *Rex v. Tynemouth*, a rate ought to have been laid on the lighthouse or on the mooring post, it remains to consider on what principle the amount of such rate is to be fixed.

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In the case of the mooring post it would not seem unfair, in such rates, to take all the net profits of the tolls, as they directly arise from the use of the corporeal hereditament: and there would be much more reason for taking the whole profit of the tolls into the calculation in the case of a lighthouse, where the whole meritorious consideration for the tolls arises from the use of the corporeal hereditament, and arises within the parish. We think, that, in the present case, in rating the landing place, the profit of the tolls cannot properly be brought into the calculation as the profits of the occupation of the landing place; which is what, in effect, is done by the rate. On the other hand, the existence of the tolls cannot be wholly excluded from consideration; but the land should be rated, not, according to the view of the appellants, as land in that situation, without reference to the tolls at all, but according to the principle relied on by the counsel for the respondents in the second branch of their argument; and the value should be taken, not as the value of the land merely, but as the value of land as enhanced by being available for the purpose of earning the tolls. This appears to be the true principle, according to the test laid down in the Parochial Assessment Act, 6 & 7 Will. 4, c. 96, as it would be the rent that could be obtained, and which the Company would have to pay, for the land, for the purpose for which it is available under the circumstances.

We think, therefore, that the order of the Sessions should be quashed, and that the landing places should be rated as land rendered more valuable by being available for the purposes of earning the tolls.

It has been suggested, that the mileage principle might

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be applied in calculating the rateable value of the land in question, and that a proportion of the profits might be assessed on the two landing places, according to the proportion which their dimensions bear to the length of the transit over the river. This principle may be fair in the case of profits derived from the use of land by a canal or railway running through different parishes; but we cannot think it at all applicable to a case where the toll is principally earned, not by any use of land, but by a voyage over a tidal estuary, not performed in any particular course, and where it is not pretended that the parish in which the tidal river is situated could say that there was any use or occupation of land in their parish.

Order of Sessions quashed.

Hilary Term, 1854.

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THE NEWMARKET RAILWAY COMPANY Apprs,
 and
 THE CHURCHWARDENS AND OVERSEERS OF THE PARISH OF
 ST. ANDREW THE LESS, CAMBRIDGE Resps.

The appellants, being empowered to make a branch line from their

UPON an appeal by the Newmarket Railway Company against a rate, made on the 21st of October, 1852, for the railway to join the E. Railway, an agreement was entered into by the Companies (confirmed by Act of Parliament), by which it was mutually agreed, that the appellants should complete the branch (which was likely to prove beneficial to the E. Company); and that, whenever, after the opening of the branch, the net earnings of the appellants' whole line should not be sufficient to pay a dividend of 8*l.* per cent. per annum on their share capital, the E. Company should pay to the appellants such a sum (not to exceed 5000*l.*) as would be sufficient to make up that dividend. There were stipulations for the interchange of traffic. The agreement to be in force for ninety-nine years from the opening of the branch.

The branch was accordingly completed by the appellants, and worked by them at a loss; and, in a certain year, the net earnings of the whole line of the appellants falling short of a dividend of 3*l.* per cent., the E. Company paid 3705*l.* under the agreement to make up that dividend.

On an appeal against a poor-rate assessed on the appellants in respect of their occupation of a portion of the branch railway,—

Held, by Coleridge, J., and Erle, J., (Lord Campbell, C. J., dissenting), that this payment of 3705*l.* ought not to be taken into account in ascertaining the rateable value of the appellants' railways.

relief of the poor in the parish of St. Andrew the Less, Cambridge, the following case was stated (under 12 & 13 Vict. c. 45, s. 11, by consent, under a Judge's order), for the opinion of this Court:—

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The appellants were rated and assessed in respect of the occupation by them of a portion, situate within the said parish, of the branch railway hereinafter mentioned, for "land used as a railway," upon a gross estimated rental of 145*l.*, and a rateable value of 116*l.* This rate was duly appealed against by the Company, upon the ground (amongst others) that they were over-rated and over-assessed. By the Newmarket and Chesterford Railway Act, 1846, (9 & 10 Vict. c. clxxii.), the appellants, by their then name of the Newmarket and Chesterford Railway Company, were empowered to make and maintain a railway from the Cambridge line of the Eastern Counties Railway, at or near Chesterford, to the town of Newmarket, with a branch to the town of Cambridge. At the time of the making of the agreement next hereinafter mentioned, the appellants had made the said railway, which they were so empowered to make, from Chesterford to Newmarket, but they had not made the said branch to Cambridge. By an agreement, bearing date and made on the 28th of May, 1851, between the Eastern Counties Railway Company of the one part, and the appellants of the other part, (a copy of which said agreement accompanied and was to be taken as part of this case), after reciting, amongst other things, that, in consideration of the benefit likely to accrue to the said Eastern Counties Railway Company from the construction of the said branch and the working of the railway of the appellants in connection with their railway, the said Eastern Counties Railway Company were willing to secure to the appellants certain advantages, as thereafter expressed and defined, it was mutually agreed between the said Eastern Counties Railway Company and the appellants (amongst other

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things) as follows, viz.—First, that the appellants should proceed with all convenient dispatch, to make and complete at their own expense, the said branch railway, viz. from Littlefield Road, in the parish of Wilbraham, to a junction with the Eastern Counties Railway at or near the Cambridge station. Twelfth, that whenever, after the opening of the said branch line, and during the continuance of the said agreement, the net earnings of the appellants after payment of working expenses and other charges upon revenue, and interest on borrowed capital, should not be sufficient to pay a dividend on their share capital or on any stock into which the same might be thereafter converted, equal to 3*l*. per cent. per annum upon their capital of 350,000*l*., the Eastern Counties Railway Company should and would, on notice and requisition to that effect by the appellants, within a reasonable time before the day in each half-year when the dividend should be made payable, pay to the appellants, or permit them to retain out of any monies in their hands for which they might be accountable to the Eastern Counties Railway Company, such a sum of money as would be sufficient to make up the dividend to the said rate of 3*l*. per cent. per annum: Provided that the whole sum payable or to be allowed by the Eastern Counties Railway Company to the appellants in any one year, under or in virtue of the said agreement, should in no case exceed the sum of 5000*l*. Eighteenth, that the said agreement should continue in force for the term of ninety-nine years, reckoned from the opening of the said branch line to Cambridge(a). After the making of the said agreement, and before the passing of the Act of Parliament hereinafter next mentioned, the appellants did, at their own expense, pursuant to the said agreement, make and complete the said branch railway to Cambridge, in the said agreement mentioned, and the same was duly opened

(a) There were other provisions for the interchange of traffic, &c., but none that tended to qualify the clauses set out.

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on the 9th of October, 1851. By the Eastern Counties and Newmarket Railways Arrangements Act, 1852 (15 & 16 Vict. c. li.), it was enacted, that the said agreement should be and was thereby made and declared to be valid and binding on each of the said Companies. The said branch railway so made and completed as aforesaid is of the length altogether of fifteen miles, of which five furlongs are situate within and run through the said parish of St. Andrew the Less, in the said borough of Cambridge. From the time of the making and completing of the said branch railway, until and at the time of the making of the said rate appealed against, the said branch railway had been and was occupied and worked by the appellants. The gross earnings of the said branch railway for the year immediately preceding the making of the said rate amounted to the sum of 9705*l.* 3*s.* 8*d.*; of which sum such part as bears the same proportion to the total sum of 9705*l.* 3*s.* 8*d.* as the length of the said branch railway situate within the respondents' parish bears to the total length thereof is to be deemed and taken, for the purposes of this case, to have been the gross earnings for the same period of and in respect of such portion of the said branch railway as is situate within the respondents' parssh, viz. 404*l.* 7*s.* 8*d.* The deductions, which were and are proper to be made in respect of the said branch railway from the gross earnings of the said branch railway during the said year immediately preceding the making of the said rate, amount to 10,370*l.* 4*s.* 2*d.* Of this sum of 10,370*l.* 4*s.* 2*d.*, such part as bears the same proportion to the total sum of 10,370*l.* 4*s.* 2*d.* as the length of the said branch railway situate within the respondent parish bears to the total length thereof is to be deemed and taken, for the purposes of this case, to be the amount of the deductions proper to be made in respect of such portion of the said branch railway as is situate within the respondent parish, for the said period, from the gross earnings of the same portion of the

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said branch railway during the same period. The gross earnings of and deductions in respect of the said branch railway during the said year being thus distributed, the result is, that, during the year immediately preceding the making of the said rate, the gross earnings of that portion of the said branch railway situate in the respondent parish were 404*l.* 7*s.* 8*d.*, whilst during the same period the deductions proper to be made therefrom amounted to the sum of 432*l.* 1*s.* 10*d.*; and consequently the deduction proper to be made from the gross earnings of that portion of the said branch railway situate in the respondent parish during that period exceeded those earnings by the sum of 27*l.* 14*s.* 2*d.*, which sum, it is admitted, was the deficiency or loss of the appellants, as occupiers of the said branch railway, on the occupation by them of so much of the said branch railway as lies within the respondent parish, during the year aforesaid. The net earnings of the appellants, after payment of working expenses and other charges upon revenue, and interest on borrowed capital, not being sufficient to pay a dividend on their share capital equal to 3*l.* per cent. per annum upon their capital of 350,000*l.*, the Eastern Counties Railway Company did, during the aforesaid period of one year immediately preceding the making of the said rate, in pursuance of the provisions above mentioned, and contained in the said agreement of the 28th of May, 1851, pay to the appellants two several sums, amounting together to the sum of 3705*l.* 9*s.* 7*d.*, as and by way of a payment to the appellants, under the said agreement, to make up the dividend upon the said share capital to the said rate of 3*l.* per cent. per annum. It is contended by the respondents, that the said sum of 3705*l.* 9*s.* 7*d.*, so paid to the appellants, ought to be taken into account in ascertaining the annual rateable value of the said railway and branch railway. The correctness of the view so contended for by the respondents is denied by the appellants. The question for the opinion of this Court is, whether the

said sum of 3705*l.* 9*s.* 7*d.* so paid to the appellants as aforesaid, ought by law to be taken into account in ascertaining the annual rateable value of the said railway and branch railway, and whether the appellants were or are by law assessable to the said rate in respect of or upon that sum. If this Court shall be of opinion that the said sum of 3705*l.* 9*s.* 7*d.* ought not by law to be taken into account in ascertaining the annual rateable value of the said railway and branch railway, and that the appellants were not or are not by law liable to be assessed to the said rate in respect of or upon that sum, then the said appeal is to be allowed, and the said rate is to be amended, by reducing each of the sums of 145*l.* and 116*l.*, which now appear upon the said rate as the "gross estimated rental" and "rateable value" of so much of the said branch railway as is situate within the respondent parish, to the sum of 21*l.*; and the said Sessions shall and may adjudge accordingly; and that the respondents do and shall pay to the appellants the sum of 20*l.* for costs. If this Court shall be of a contrary opinion, then the said appeal is to be dismissed, and the Court of Quarter Sessions shall and may adjudge accordingly; and that the appellants do and shall pay to the respondents the sum of 20*l.* for costs.

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Worledge (June 1st, 1853), for the respondents, cited *Reg. v. The Grand Junction Canal Company (a)*, and *Rex v. The Oxford Canal Company (b)*.

Hawkins, for the appellants, cited *Rex v. The Undertakers of the Aire and Calder Navigation (c)*.

The arguments are fully noticed in the judgments.

Cur. adv. vult.

The Court, differing in opinion, delivered their judgments (January 30, 1854) *seriatim*.

(*a*) 4 Q. B. 18. (*b*) 10 B. & C. 163. (*c*) 3 B. & Ad. 533.

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ERLE, J.—The only question submitted to us in this case is, whether, in rating the appellants to the relief of the poor for the portion of their railway in the parish of St. Andrew the Less, a sum of 3705*l.* 9*s.* 7*d.* paid to them by the Eastern Counties Railway Company ought to be taken into consideration as adding to the rateable value.

By the Newmarket and Chesterford Railway Act, 1846, the appellants were empowered to make a Railway from Chesterford to Newmarket, with a branch to Cambridge. The appellants having made the railway from Chesterford to Newmarket, but not the branch to Cambridge, and the Eastern Counties Railway Company, with whose line it was to communicate, desiring that it should be completed, the two Companies, on the 28th of May, 1851, entered into articles of agreement, by which, after reciting that the Eastern Counties Railway Company were willing to secure to the Newmarket Railway Company certain advantages, it was stipulated that the Newmarket Railway Company should, with all convenient dispatch, make and complete the said branch to a junction with the Eastern Counties Railway at Cambridge; and that whenever the net earnings of the Newmarket Railway Company should not be sufficient to pay a dividend equal to 3*l.* per cent. per annum on their capital of 350,000*l.*, the Eastern Counties Railway Company would pay to the Newmarket Railway Company such a sum of money as would be sufficient to make up the dividend to 3*l.* per cent. per annum, so that this sum should not exceed 5000*l.*

The branch was accordingly made by the Newmarket Railway Company, and opened on the 9th of October, 1851; and the agreement, which was entered into for ninety-nine years, was in 1852 confirmed by Act of Parliament. The branch railway continued to be occupied and worked by the appellants; and in the year preceding the making of the rate appealed against, the appellants were unable from their net earnings to pay a dividend of 3*l.* per cent. upon their capital, and the Eastern Counties Railway Company paid them 3705*l.* 9*s.* 7*d.*, under

the agreement to make up the dividend to 3*l.* per cent. per annum.

The appellants contend that this sum ought not to be taken into consideration in assessing them, as occupiers of the railway, to the relief of the poor, as it is not an earning of their railway, nor rent, nor money in the nature of rent paid for the use of the railway, but a payment arising from a contract of guarantie, and not derived from the profits of the occupation of the land. And I am of this opinion.

The rateable value of the railway is by the Parochial Assessments Act (6 & 7 Will. 4, c. 96,) the rent at which the same might reasonably be expected to let from year to year, free of all usual tenants' rates and taxes, and deducting the probable costs necessary to maintain it in a state to command such rent. If the railway was let, the amount of rent would depend on the amount of annual profit to be derived therefrom, and it would be immaterial to the tenant whether this exceeded or fell short of 3*l.* per cent. on the cost price of the line. The cost of a construction does not indicate the profit to be obtained therefrom as a matter of fact; and it was decided in *Reg. v. Mile-end Old-town*(a), to be no criterion in law of the rateable value of any property to the poor-rate. If the purchaser of a farm had a guarantie that the rent should yield him 3*l.* per cent. on the purchase money, the rateable value—that is, the rent which a tenant would pay for the farm—would not be increased by this collateral contract between the landlord and the guarantor. Now, the Newmarket shareholders are in effect the landlords of the railway, the company are the tenants paying dividend for rent, and the Eastern Counties Railway Company are the guarantors; and the contract of guarantie is irrelevant to the rateable value.

Furthermore, the sum paid under the guarantie is not rateable, for it is not a parochial profit; nothing is due under the guarantie until the profits upon both the Newmarket

(a) 10 Q. B. 208.

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and Chesterford and the Newark have been ascertained, when, if 10,500*l.*, the guarantors must pay cover how the failure of profits in distant parishes becomes a net line in St Andrew the Less, & part alone would pay rent as proof of the rateable value of that it is worked at a loss; that net loss, and so to earning of which the guarantors pay: thus the reason of the guarantee pro tanto a principle the greater the loss would be the parochial share of guarantor, which seems a strange

Furthermore, the rate upon guarantee is not legal, for it falls on the guarantor. The rate is set by the Eastern Counties Railway Company; but if it is paid by the Eastern Counties Railway to make good the deficiency in paying all deductions, will not be a cent on the capital; in proportion as the net profits are less, the made good is greater. The provisions to be provided for before and if the 3705*l.* now required be subject to poor-rate, it will not be a dividend, but must be increased. Nay, if the principle is followed, not only pay the poor-rate on the rateable value, and the subject on; and these consequences, which also lead to strange results.

With respect to the profits of

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which traffic is interchanged between the two Companies, those profits are liable to be rated where they arise, and are not included in the present question; and it should be observed, that the terms in the agreement are throughout a premium to the Newmarket shareholders to induce them to advance the necessary capital for making the line.

With respect to the argument from the expected amount of rent or profit, that may be presumptive evidence of the rateable value, but it is a presumption open to being rebutted; and here there is no room for presumption, as it is found by the case that the sum in question is not a profit derived from the railway in the parish, but a payment under a contract, by reason of the absence of profit.

With respect to the argument from the tendency of the line of the Newmarket Railway Company to increase the profits of the Eastern Counties Railway Company: The Newmarket Railway Company are not liable to be rated for any profit, or tendency to profit, enjoyed by another Company; that Company must be rated for the profits they actually make in the parish where they arise; but no Company is liable to be rated for a supposed tendency to profit not resulting in actual profit. The respective values of two rateable subjects may be increased by combining their operation, and in that event the rate will be increased accordingly; but the rate must be on the actual profit when it arises, and not on a tendency to profit.

I consider that this principle was laid down in *Reg. v. The Great Western Railway Company* (a), where it was contended, that a branch railway, yielding no profit, was liable to be rated on account of its tendency to increase the profit of the trunk line; and the Court decided to the contrary, and in so deciding did not impair the principle, that the rateable value of each of two rateable subjects may be

(a) 15 Q. B. 1085; ante, p. 130.

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increased by their combined operation, in case the aggregate of the profits from both is increased thereby.

On these grounds I have come to the conclusion, that the sum paid under the contract of guarantie in this case was not rateable, and that the rate ought to be reduced accordingly.

COLERIDGE, J.—The facts of this case have already been sufficiently stated, and it is unnecessary for me, therefore, to repeat them; and the question which they raise is, whether a proportional part of a sum of 3705*l.* 9*s.* 7*d.*, paid by the Eastern Counties Railway Company to the appellants, ought to be taken into account in assessing them as occupiers of land in the respondents' parish, on the ground that it forms part of the rateable value of that land.

There can be no dispute as to the principle which is to determine this question—that money or money's worth should form part of the rateable value of land: it is not enough that the occupier should receive it, being the occupier, or even because he is the occupier, but it must, directly or indirectly, spring out of and be part of the fruits of the occupation. If the Marlborough pension, granted under the 5 Ann. c. 4, had been limited to John Duke of Marlborough and his heirs, occupiers of the Blenheim estate, it would have been received by the duke for the time being in some sort because he was occupier—that is, if not occupier he would not receive it; and yet it could never have been considered as forming part of the rateable value of the estate. It would not in that sense spring out of the occupation. This distinction was, I think, recognised by this Court in *Rex v. The Aire and Calder Navigation Company* (a), where the occupiers of certain mills in Hunstret received tolls collected in a different township as a compensation for loss of water by the works of an adjoin-

(a) 3 B. & Ad. 533.

ing Navigation Company; and these were sought to be included in the rateable value of the mills, as increasing the value of the occupation of them. Lord *Tenterden*, delivering the judgment of the Court against the assessment, says, "Suppose that, instead of the toll, an annual rent had been given, or a sum in gross from which they had derived an income, could they have been rated in respect of that, as profit arising from their property in Hunslet?"

There are special circumstances in that case which prevent me from considering the decision as a direct authority for the case before us, but the passage which I have cited from the judgment illustrates the distinction which must be kept in view. The very nature of the distinction makes it rather difficult to apply it, and very small changes in the circumstances would make the case fall within one or the other branch of it. Thus, if the Eastern Counties Railway Company were under an agreement to pay absolutely a sum per head, in addition to the ordinary fare, for every passenger brought upon the appellants' line to be forwarded on their line, this would have been a sum received for the transit of such passenger, and would have been as much a part of the profits of the occupation as the ordinary fare which the passenger himself paid. But the substance of the actual agreement seems to be rather that of a guarantie, which is not to come into operation till the actual fruits of the occupation fall below a certain amount. The dividend on the capital is to be paid from the clear profits of the occupation: when they fail, the guarantie comes in, not to increase those profits, but to make the dividend good from another and independent and collateral source. But it is the profits, after deducting the proper outgoings, upon which the rate is to be assessed; and when that is done, and not before, it will be seen whether the guarantie is to operate or not. In the present case, the total receipts fall below the outgoings; the line is worked at a loss. But suppose there had been a surplus sufficient for a dividend

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of 2*l.* per cent., ought not the rate to have been imposed on that? And then, when the Eastern Counties Railway Company had under their guarantie paid 1*l.* per cent., would not the distinction between the sources of the 2*l.* per cent. and the 1*l.* per cent. have been obvious, and would it not have followed that the latter ought not to be brought into the assessment? This was an obligation which the Eastern Counties Railway Company, for the interest which it was conceived they had in the appellants' line being made and worked, took on themselves.

Supposing it had, instead of being shaped in the present form, been by way of a large sum paid down on the completion of the line, which sum the appellants had set apart as a rest or reserve fund, and then in any year, the dividend falling low, a sum had been voted from that rest, and applied, in addition to the dividend, so as to raise it to a given amount: could it have been said that that addition formed any part of the fruits of the occupation during the preceding six months? I think not; and yet I do not see how that case would have differed in principle from the present. The "rateable value" must always have been included in and formed part of the "gross estimated rental;" and that gross rental must have been estimated before the process of deduction from it commenced. In the present case, it might be perfectly clear, before commencing that process, that the outgoings would overtop the gross receipts; but it is by no means an unreasonable thing to suppose the gross receipts mounting so high as to make it impossible to say beforehand whether there would be any, and if any, what amount of clear profits, until the process of deduction had been gone through. The necessity, then, for recourse to the help of the guarantie would be contingent, and the addition ultimately to come from that source to make up the 3*l.* per cent. dividend would be subsequent to the complete ascertainment of the two sums, the ascertainment of which was alone necessary to arrive at the rateable value.

It will be said, of course, that, in order to arrive at the rateable value, a negotiation for a lease from year to year must be supposed, and that that negotiation must be supposed to proceed on the footing of the lessee being placed in exactly the same position as the present occupiers; and this is unquestionably true as to everything which necessarily arises from the occupation. But if thence it is inferred that the supposed lessee would necessarily, as such, have the benefit of this guarantie, it seems to me the very question in the case is begged. In point of fact, a lease of the line might very well be made, supposing the requisite powers, without involving a transfer of the benefit of this agreement to the lessee.

Suppose at any six months end the accounts made up, and clear profits shewn, from which a dividend of 2*l.* per cent. might be paid, the Eastern Counties Railway Company, upon application, refusing to perform their agreement, and an action brought on it: I apprehend, that, before such action brought, the course would have been to declare the dividend of 2*l.* per cent., which would have been after deduction of the poor-rate, and then to sue for the difference. Now, the foundation of that action would have been the deficiency of those clear profits upon which the assessment must have been made, i.e. in the words of the agreement, "the net earnings of the appellants, after payment of working expenses and other charges upon revenue, and interest on borrowed capital." In this case it seems to me clear, that, if the appellants succeeded in their action, and recovered in damages the difference sued for, that sum could not find its way properly into the rateable value; and I do not see any distinction in principle between that case and the present as to the question before us.

The facts of this case are very peculiar, and will seldom form a precedent for any other. Upon the best understanding of them which I have been able to form, I think the appellants are entitled to our judgment.

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LORD CAMPBELL, C. J.—In this case, I have the misfortune to differ from my Brothers *Coleridge* and *Erle*; and although their opinion must prevail, I consider it my duty to state the grounds on which, entirely concurring in the general principles which they lay down, I arrive at a different result.

The only question submitted to us is, whether, in rating the appellants to the relief of the poor for the portion of their railway in the parish of St. Andrew the Less, the sum of 3705*l.* 9*s.* 7*d.*, paid to them by the Eastern Counties Railway Company, ought to be taken into consideration in estimating the rateable value.

The appellants were empowered to make a railway from Chesterford to Newmarket, with a branch to Cambridge. The appellants having made the railway from Chesterford to Newmarket, but not the branch to Cambridge, and the Eastern Counties Railway Company, with whose line it was to communicate, considering that they would derive great benefit from its completion, the two Companies, on the 28th of May, 1851, entered into articles of agreement, by which, after reciting that the Eastern Counties Railway Company were willing to secure to the Newmarket Railway Company certain advantages, it was stipulated that the Newmarket Railway Company should make and complete the branch to a junction with the Eastern Counties Railway at Cambridge, and that whenever the net earnings of the Newmarket Railway Company should not be sufficient to pay a dividend equal to 3*l.* per cent. per annum, on their capital of 350,000*l.*, the Eastern Counties Railway Company would pay to the Newmarket Railway Company such a sum of money as would be sufficient to make up the dividend to 3*l.* per cent. per annum, so that this sum should not exceed 5000*l.* The branch was accordingly made by the Newmarket Railway Company, and opened on the 9th of October, 1851. This agreement, which was entered into for ninety-nine years, was in 1852 confirmed

by Act of Parliament. The branch railway continued to be occupied and worked by the appellants. In the year preceding the making of the rate appealed against, the appellants were unable from their net earnings to pay a dividend of 3*l.* per cent. upon their capital, and the Eastern Counties Railway Company paid them 3705*l.* 9*s.* 7*d.* under the agreement to make up the dividend to 3*l.* per cent. per annum.

The appellants contend that this sum ought not at all to be taken into consideration in assessing them, as occupiers of the railway, to the relief of the poor; alleging that it cannot be treated as the earnings of their railway, or as rent, or as money paid in the nature of rent for the use of the railway, and ought to be considered only as an indemnity to the appellants, or a payment to them under a guarantie, unconnected with the occupation or enjoyment of land.

But I am of opinion, that, in assessing the appellants for the portion of the branch line which is in the limits of the respondent parish, this payment ought to be taken into consideration.

I think it is received by the appellants in respect of their occupation of their Railway, and is part of the profits of that occupation. It is evidently made in consideration of an advantage which the Eastern Counties Railway Company calculate that they derive from this branch Railway from Chesterford to Cambridge. Whether it be a fixed annual sum, or a sum depending upon a contingency, it is equally in respect of the use made of the Railway occupied by the appellants, and when received it is part of the profits of that Railway. If the Eastern Counties Railway Company paid the appellants a sum of money for being allowed to bring passengers in their own carriages from Chesterford to Cambridge gratis, that these passengers might be carried on the Eastern Counties line for hire from Cambridge to London, little doubt can be entertained that such a payment would be part of the profits of the branch

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of the appellants; and it seems to make no difference that the payment is made in respect of passengers brought from Chesterford to Cambridge in carriages of the appellants, the Eastern Counties Railway Company deriving the same profit from conveying them forward to London. The Railway within the respondent parish is rendered more valuable and productive by something connected with the use of it in another parish; and, according to decided cases, its rateable value within the respondent parish is thereby enhanced.

By the 7th article of the agreement, "in respect of all traffic, whether of passengers or goods, which the Newmarket Railway Company shall bring from any part of their Railway distant more than four miles from the Cambridge station to Cambridge, to be carried upon the Eastern Counties Railway" to certain places enumerated, "the Newmarket Railway Company shall be entitled to retain, out of the tolls received by them upon such traffic, 60% per cent. of the gross amount thereof." The percentage of the tolls so retained would clearly be part of the profits of the branch in respect of which the appellants would be liable to be rated, and the effect would not be different if this right of retention had been made to depend upon the contingency of profits of the Newmarket Railway Company not being otherwise sufficient to enable them to pay a dividend of 3% per cent. upon their capital.

Again: suppose that, with a view to make the branch a more effective feeder to the Eastern Counties line from Cambridge to London, it had been stipulated by the agreement that the Newmarket Railway Company should bring goods and passengers at very low rates from Chesterford to Cambridge, the Eastern Counties Railway Company undertaking to make up the deficit if the net profits did not enable the Newmarket Railway Company to pay a certain dividend on their capital, surely a payment to make up the deficit ought to be included in the gross earnings of the

branch in estimating its rateable value; and for this purpose there seems to be no difference, on principle, between such a payment and that which we have here to decide upon.

It is admitted, that, if the Eastern Counties Railway Company had agreed absolutely to pay the appellants so much a head for every passenger carried from Chesterford to Cambridge, and travelling on by the Eastern Counties Railway to London, such a payment would be part of the earnings in respect of which the appellants would be rateable. Could any difference be made by a proviso that this payment should not exceed the sum necessary to make up a dividend of 3*l.* per cent. to the shareholders of the Newmarket Railway Company, and that, such dividend being made up, the payment should cease? While the payment goes on to make up the dividend, it still seems to be part of the fruits of the occupation of their Railway by the appellants, and I conceive that it must be taken into account in estimating the assessable value of the Railway. But all the difficulties pointed out in bringing the payment in question into account might be urged against bringing into account the supposed payment, which appears so clearly to be an ingredient in the assessable value. While such payments continue, I do not see why they are less profits of the Railway because upon a contingency they may cease. If this branch were let to a tenant, he would be entitled, under the agreement and the Act of Parliament confirming it, to this contingent payment, and no doubt it would enhance the amount of the rent which, as a tenant from year to year, he would be willing to offer for it.

I have only further to observe, in answer to an objection raised at the bar, that, in my opinion, the contention of the respondents does not lead to the double rating of the same profits; for, if the Newmarket Railway Company were rateable in respect of a payment made to them under this

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agreement, or under an agreement whereby the Eastern Counties Railway Company undertook to pay them absolutely a certain sum for each passenger brought from Chesterford to Cambridge, the Eastern Counties Railway Company would be entitled to a deduction, in respect of such payment, from their gross earnings, whenever the assessable value of their railway comes to be estimated.

I wish to adhere to the recent as well as the earlier cases on this subject, with this caution, that, when we were determining that in rating railways the parochial not the mileage principle was to be adopted, the Court did not mean to intimate that the assessable value of land in one parish might not be increased by a profit derived from it by the occupier, as occupier, in consideration of an advantage derived from it in another parish.

Upon the whole, my opinion is in favour of the respondents. But there must be judgment for the appellants.

Judgment for the appellants.

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THE CHURCHWARDENS AND OVERSEERS OF THE POOR OF
THE PARISH OF DORKING Respondents.

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THIS was a case stated by consent under Judge's orders, on two appeals by the South Eastern Railway Company against two rates for the relief of the poor of the parish of Dorking. The following were the material parts of the case:—

The R. Railway Company, under the powers of their Act, leased their line, which joined the S. E. Railway, to the S. E. Railway Company, at a certain rent for 1000 years; and the S. E. Company became, under the lease, the occupiers of the line, working it in connection with their own railway. The R. Company was afterwards incorporated

The South Eastern Railway Company was established and incorporated under that name by stat. 6 & 7 Will. 4, c. lxxv., which authorised the Company to make a railway from the London and Croydon Railway to Dover, to be called "The South Eastern Railway." The Reading, Guildford, and Reigate Railway Company were incorporated under that title by the Reading, Guildford, and Reigate Railway Act, 1846, (9 & 10 Vict. c. clxxi.), and was thereby authorised to make a railway from the Great Western Railway at or near the Reading station of such railway, in Berk-

with the S. E. Company by Act of Parliament, under which the amalgamated Company was to pay to the shareholders of the R. Company annuities equivalent to and in lieu of the above rent; and the R. line then became part of the S. E. line. On an appeal against two poor-rates, assessed upon the S. E. Company as occupiers of so much of the R. line as passed through the parish of D.,—the one made during the existence of the lease, and the other after the amalgamation:—*Held*, that the rent in the one case, and the annuities in the other, were not to be taken as the sole or conclusive criterion of the rateable value.

The R. line brought a great deal of additional traffic to the main line of the S. E. Company, and that Company derived benefit from the R. line as a feeder to the main line in respect of traffic conveyed upon that line. The R. line, if in the market, might be an object of competition between the S. E. Company and other Railway Companies; the traffic on the main lines of which would be increased by the possession and control of the R. line.

Held, by Lord Campbell, C. J., Coleridge, J., and Crompton, J. (*Erle*, J., dissenting), that these were matters giving additional value to the occupation of the R. line in the parish of D., which, though lying in other parishes, ought to be taken into account in rating the line in that parish.

Held, by *Erle*, J., that the earnings in other parishes, though increased by the occupation of the R. line in the parish of D., ought to be rated in those other parishes, and not in D.

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shire, to join the South Eastern Railway in the parish of Reigate, in Surrey. The same statute enacts, that it shall be lawful for the Reading, Guildford, and Reigate Railway Company to demise or lease the Reading, Guildford, and Reigate Railway to the South Eastern Railway Company, for such term and upon such conditions as shall be, or as shall have been, agreed upon between the said Companies, and to carry into effect any arrangement not inconsistent with any of the provisions thereinbefore contained, that shall be, or shall have been, agreed upon between the said Companies, subject to the provision next hereinafter contained, which is to the effect, that the Reading, Guildford, and Reigate Company should proceed with the construction of the entire line from Reading to Reigate, so that the same should be completed within the time limited by the Act, and that it should not be lawful for them to enter into any agreement with the South Eastern Railway Company for the abandonment of any portion thereof. By articles of agreement, under the respective common seals of the said Companies, made on the 11th of May, 1847, it was agreed between the said Companies that the Reading, Guildford, and Reigate Company should grant to the South Eastern Railway Company a lease at a rent equal to 5*l.* 10*s.* per cent. per annum on the capital raised and to be raised by the Reading, Guildford, and Reigate Company, not exceeding 600,000*l.*, without any participation in profits by the last-mentioned Company; by way of commutation of the rent of 4*l.* 10*s.* per cent. per annum and one-half of the profits, as provided by an agreement dated the 2nd of April, 1846, and made between the Reading, Guildford, and Reigate Railway Company and the South Eastern Railway Company, (not then incorporated); and that the portion of the line between Dorking and Reigate should be included in the said lease; and also, that when the Reading, Guildford, and Reigate Railway Company should have made the said Reading, Guildford, and Reigate line, they should grant,

and the said South Eastern Railway Company should accept, a lease thereof for 1000 years, on the terms in such agreement mentioned.

The Reading, Guildford, and Reigate line was completed, and opened for traffic throughout from Reigate to Reading, before the 15th of March, 1850, on which day a lease was granted by the Reading, Guildford, and Reigate Railway Company to the South Eastern Railway Company for the term of 1000 years, at the yearly rent of 33,000*l.*, clear of all rates and charges, except income tax. The lease also provided that the South Eastern Railway Company should pay interest, not exceeding 4*l.* per cent. per annum, on a bond debt of 200,000*l.* incurred in making the Reading, Guildford, and Reigate line, which interest amounts to the sum of 8000*l.* a year. The South Eastern Railway Company are bound by the lease to keep the line of railway in repair. When the lease was granted, the South Eastern Railway Company were bound by the agreement of the 11th of May, 1847, to take the lease. A copy of this lease, and a copy of the agreement of the 11th of May, 1847, together with copies of the Acts of Parliament herein referred to, accompany this case, and are to be deemed part thereof. The Reading, Guildford, and Reigate Railway Company, mentioned in the said lease, forms a junction with the said South Eastern Railway at Redhill, in the parish of Reigate, in the county of Surrey, and runs thence to Reading, in the county of Berks, but it does not form a junction with the Great Western Railway. The Reading, Guildford, and Reigate line is worked by the South Eastern Railway Company in connection with the main line from London to Dover, and the branches connected therewith; and the South Eastern Railway Company are the sole occupiers of the whole of the said lines, on which they carry on exclusively a business as carriers of passengers and goods. There are forty-six miles of railway between the junction at Redhill and Reading, but only forty miles of

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this railway are demised by the line between Guildford and As Western Railway Company, an South Eastern Railway Company of toll, pursuant to an agreement between the said Guildford, and Reigate Railway Western Railway Company. The Reigate line, leased to the South Eastern Railway Company, passes for a length of 341 ch in the parish of Dorking, in the county of Surrey, for the relief of the poor of the parish, and for other purposes chargeable thereon, on the 6th of December, 1849, paid the South Eastern Railway Company as occupiers of the portion of the parish at a rateable value of 2 demanded of the South Eastern Railway Company amounts to 222*l.* 16*s.* In this case, the said rate is to be taken as the rate of the said lease, the South Eastern Railway Company disputing that they were equally liable for the said rate as if the said

The South Eastern Railway Company against the said rate.

The respondents had, in and to the said rate, assessed the South Eastern Railway Company in respect of the said portion of the parish of Dorking, upon a valuation for 41,000*l.* paid by the said Company to the Reading, Guildford, and Reigate Railway Company. The rent is the proper criterion of the value of the said assessment of 222*l.* 16*s.* 3*d.* In the case of the South Eastern Railway Company, the said Reigate line, did not, in the year for which the 41,000*l.* less the statutory dedu

Assessments Act. The Reading, Guildford, and Reigate line brought a great deal of additional traffic to the main line of the South Eastern Railway Company, and the latter Company thus derived benefit from the Reading, Guildford, and Reigate line, as a feeder to the main line, in respect of traffic conveyed upon that line. The Reading, Guildford, and Reigate line, if in the market, might be an object of competition, in consequence of the spirit of rivalry existing between the South Eastern Railway Company and other railway companies, the traffic on the main lines of which would be increased by the possession and control of the Reading, Guildford, and Reigate line.

By “The South Eastern and Reading, Guildford, and Reigate Railways Amalgamation Act, 1852,” 15 & 16 Vict. c. ciii., and which Act is to be considered as part of this case, it was in the 3rd section enacted, “that from and after the passing of this Act the Reading Company shall be dissolved, and, subject to the powers and provisions of this Act, all the undertakings, estates, property, and effects whatsoever, of that Company already demised to the South Eastern Company, and all the capital, and all other the property and effects and all the estates, rights, and interests, powers, authorities, and privileges, both at law and in equity, and otherwise howsoever, of the Reading Company, shall respectively remain and be transferred to and vested in the South Eastern Company absolutely and for ever, and shall be deemed part of the original undertaking of that Company.” And in the 27th section of the same Act it was also enacted, “that from and after the passing of this Act the whole of the undertaking of the South Eastern Company shall be charged with the payment to the shareholders in the Reading Company, their successors, executors, administrators, and assigns, of 40,000 perpetual annuities of 1*l.* 0*s.* 6*d.* each (making the aggregate perpetual annuity of 41,000*l.*), by way of commutation for the yearly rent and other yearly

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sums payable under the recited lease by the South Eastern Railway Company to or for the benefit of the Reading Company.

By another rate or assessment for the relief of the said parish of Dorking, and for other purposes thereon according to law, made after the said last-mentioned Act of Parliament, viz. on the 6th of November, 1852, after the rate of 1s. 8d. in the pound on the value of the said railway in Dorking parish, at a rateable value of 5040*l.* 10*s.*, and the rate claimed of the South Eastern Railway Company on that assessment amounts to 420*l.*

The South Eastern Railway Company duly complied with the said last-mentioned rate.

The whole of the facts and circumstances stated as to the first-mentioned rate are applicable to the case of the last-mentioned rate, with the exception of the said lease, which is applicable only to the first-mentioned rate, and the said last-mentioned Act of Parliament is applicable only to the said last-mentioned rate.

The questions for the opinion of the Court were: 1st, whether the appellants were properly assessed in the said rate of the 6th of December, 1849, at the sum of 222*l.* 16*s.* 6*d.*; 2ndly, whether the appellants were properly assessed in the said rate of the 12th of November, 1852, at the sum of 420*l.* 0*s.* 10*d.*; 3rdly, whether the appellants were entitled to be assessed in respect only of the net profit from the traffic passing through Dorking, irrespective of any rent paid by the Company, and the value of the said line as increasing on the main line; 4thly, whether the respondents were entitled to take into consideration in their assessment the value of the line to the appellants as an integral part of the South Eastern Railway, in addition to the net profit from the traffic passing through the parish of Dorking.

If the Court should be of opinion that the said lease was the proper criterion of the rateable value of the said railway, the said assessment, made on

existence of the lease, then the assessment was to be confirmed. If the Court should be of a different opinion, then the matter was to go back to the Quarter Sessions, or an arbitrator to be appointed by counsel on both sides, to determine the proper amount of assessment, in conformity with the opinion of the Court upon the second and third questions; and the rate was to be amended accordingly. If the Court should be of opinion, that, as regards the last-mentioned assessment, either the rent reserved under the said lease (notwithstanding such rent had ceased before the making of such last-mentioned assessment), or the annuity payable under the said last-mentioned Act of Parliament, was the proper criterion of the rateable value, then the same was to stand confirmed. If the Court should be of a different opinion, then the same course was to be taken as with respect to the first rate.

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Pashley (with him *Bros*) (June 8, 1853) for the respondents, cited on the first point *Rex v. Parrot* (a), *Reg. v. Vange* (b), and *Reg. v. The Manchester South Junction and Altrincham Railway Company* (c); on the second and third points *Rex v. The New River Company* (d), *Reg. v. The Grand Junction Railway Company* (e), *Reg. v. The Cambridge Gas Company* (f), *Rex v. The Brighton Gas Company* (g), *Reg. v. Mile End Old Town* (h), and *Reg. v. The Great Western Railway Company, Tilehurst case* (i).

[*Crompton, J.*, referred to *Reg. v. The North and South Shields Ferry Company* (k).]

Willes for the appellants.—All that is found in the case

(a) 5 T. R. 593.

(g) 5 B. & C. 466.

(b) 3 Q. B. 242.

(h) 10 Q. B. 208.

(c) 15 Q. B. 395, n. (b).

(i) 15 Q. B. 379, 1085; ante, p.

(d) 1 M. & Selw. 503.

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(e) 4 Q. B. 18; ante, Vol. 4, p. 1.

(k) 1 E. & B. 140; ante, p.

(f) 8 Ad. & E. 73.

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is, that the rent or annuity of 41,000*l.* is given for the branch, and this and no other criterion has been used to ascertain the rateable value; which is clearly erroneous.

On the second and third points he cited *Reg. v. The London and South Western Railway Company* (a), and *Reg. v. The Great Western Railway Company* (b).

Cur. adv. vult.

The Judges delivered (Feb. 18th, 1854) their judgment *seriatim*.

CROMPTON, J.—The first question is, whether the two assessments in question are proper; and it is stated that they are to be regarded as proper, and are to be confirmed, if the rent as to the first rate, or the rent or annuity as to the second, is the proper criterion of the rateable value. I understand by the question, as explained by this statement, that we are to say whether, in our judgment, these assessments were properly made by taking the rent, before the statute of amalgamation, or the rent or annuity, after that Act, as the sole criterion from which the assessment is to be made; and I am of opinion that it can by no means be so considered.

Even as to the first rate, where the smaller line has not become a portion of the other, the rent can only be taken as matter of evidence of the rateable value, or of the rent at which it might be expected to be let under the Parochial Assessments Act, 6 & 7 Will. 4, c. 96; and all the circumstances under which that rent may at first have been given, or which may have subsequently affected the value of the portion of the line, must be taken into account so as to see what would be the rent that might be expected to be got from it at the time when the assessment is made. Under neither of the rates can the rent or annuity be taken to be the sole criterion from which the assessable value can be arithmetically deduced.

(a) 1 Q. B. 558; ante, Vol. 2, p. 629.

(b) 6 Q. B. 179; ante, Vol. 4, p. 28.

I therefore answer the first question, as explained by the subsequent matter, by saying, that in my opinion these assessments are not to be confirmed.

Secondly, I think that, in strictness, the value of the branch, as a feeder, is to be taken into account in ascertaining the rateable value. It is profit derived from the occupation of the land; and it seems to me impossible to say that the value to the persons willing to take the line, or the rent likely to be got from them, would not be increased by the advantage of this line to, and from its being a feeder of, the larger railway. The value of the land in the parish is increased and enhanced by its being useful as increasing the profit that may be made in another place; and I think that the rateable value within the parish may clearly be enhanced by matters in another parish. It is true, that in the mode of taking the account of the earnings in the parish, and of the deductions to be made, according to the mode mentioned in the recent cases of *Reg. v. The Great Western Railway Company (a)*, no item is mentioned for the value in respect of being a feeder to the main line; and it may be difficult, and often not worth while, to introduce this new element into the account; but, on principle, the rateable value, according to the rule in the *Parochial Assessments Act, 6 & 7 Will. 4, c. 96*, seems to me affected by the value of the line in the particular parish as a feeder of the main line.

I answer the second question, therefore, in the negative.

And, as I suppose that the third question refers to the value of the branch line as a feeder, no other peculiar value than as a feeder being suggested, the third question seems, in effect, another way of putting the second; and I answer it in the affirmative: that the respondents are entitled, in making their assessment, to take into consideration the value as a feeder to the main line.

(a) 6 Q. B. 179; ante, Vol. 4, p. 28; 15 Q. B. 379, 1085; ante, p. 130.

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ERLE, J.—In this case I consider the material fact to be, that one rate was made while the Reading and Reigate Railway was under lease, and the other after it was amalgamated with the South Eastern Railway; and the material questions to be, what is the principle for ascertaining the rateable value of the portion of the line in the parish of Dorking for each rate: the parish contending that the rent of £1,000^{l.} paid at the time of the first rate, and an annuity of £1,000^{l.} paid since the amalgamation, should be taken as the rateable value of the whole line, to be apportioned among the different parishes; the railway contending that the net earnings of the portion of the line in the parish should be taken as the rateable value.

As the rate since the amalgamation is the most important being the guide for future rates, I take that first.

By the amalgamation, the Reading and Reigate Railway, which was a feeder, has become part of the South Eastern line, as much as if it formed part of the original construction; so that now either all is line or all is feeder. The amalgamation in this case being in no respect distinguishable from the amalgamation of the Newbury and Haverhill line with the Great Western: *Reg. v. The Great Western Railway Company*(a). There the principle for rating the railway, by taking the net profit of the whole line and apportioning the rateable value of the whole, and by apportioning the rateable value among the parishes in proportion to the net earnings in each parish, was sanctioned and acted on. The principle was decided to be correct, after long consideration in *Reg. v. The London, Brighton, and South Coast Railway Company*, *Reg. v. The South Eastern Railway Company*, and *Reg. v. The Midland Railway Company* and I extract the principle as expressed in each of these cases. In *Reg. v. The London, Brighton, and*

(a) 15 Q. B. 379, 1085; ante, p. 130.

(b) 15 Q. B. 313, 344, 353; Vol. 6, pp. 440, 459, 461.

Coast Railway Company (a), the parish of Croydon claimed a right to rate the railway on the principle of parochial earnings—that is, at such a sum as a solvent tenant would pay as annual rent for the stations and portion of the railway within the parish, regard being had to the net revenue earned in the parish; and this principle was affirmed by the Court. In *Reg. v. The South Eastern Railway Company* (b), the parish of Westbere claimed to rate the Company for a portion of the branch to Ramsgate on the mileage principle of dividing the rateable value of the trunk and branches according to the distance in each parish. It was found that the traffic upon the main or trunk line was greater than upon any of the branches. The Company contended for the principle of parochial earnings, viz. that they ought to be rated at such sum as a tenant might be expected to give as annual rent for that portion of the branch railway situate within the parish of Westbere, regard being had to the portion of profit earned by the portion of the railway within that parish, such rent being ascertained by taking the gross annual receipts from the portion of the railway situate in Westbere, such gross receipts being ascertained by taking a proportion of the fare paid by every passenger who has during the year been carried by the Company over any portion of the line in Westbere, such proportion bearing the same ratio to the whole sum paid by such passenger for the whole distance travelled by him, as the distance in Westbere bears to the whole distance travelled by him; and calculating goods on the same principle; and taking from such earnings the deductions allowed by the Parochial Assessments Act, 6 & 7 Will. 4, c. 96;—and it was held, that this principle of estimating the gross profits was correct, and that deductions were to be on the parochial principle also. It is said, in argument, “Here there is a parish including only a portion of a branch line, upon which it is expressly found that the profits

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(a) 15 Q. B. 313; ante, Vol. 6,
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(b) 15 Q. B. 344; ante, Vol. 6,
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fall far short of those earned on the main line. The profits on which the rate is to be calculated are those arising within the rating parish if so, the respondent parish has no right to any of the profits earned on the main line (a).” The judgment of the Court supports this argument. In *Reg. v. The Midland Railway Company* (b), the parish of Basford was rated on the mileage principle; the Company contended that the rate ought to be estimated by reference solely to the net profits earned by the railway within that parish without any reference to the net profits earned elsewhere, or to the rateable value of any portion of the railway lying in any other parish. The judgment affirms this principle. In *Reg. v. The Great Western Railway Company* (c), the question was, how the expenses of a railway were to be apportioned; and it was held, that they also, where they are local, are to be apportioned to the parish where they arise and deducted from the gross earnings in that parish, calculated on the principle laid down in the foregoing cases. Nothing more than the gross earnings in the parish were allowed to the parish, although it was found that it was profitable to the Company, as proprietors of the entire Great Western Railway, by reason of the increased traffic brought thereby upon the main line, and the increased receipts upon that line between London and the western terminus of it. As each parish is held entitled to rate for the earnings therein—as, for example, Croydon, for all that is earned therein—it is clear that none of the other parishes on the line can rate for the tendency of the line situated in them to make the earnings in Croydon: the earning is profit, and if the whole profit in Croydon is rated there, and the tendency to create that profit is rated elsewhere, the same profit would be, in effect, rated twice; which is un-

(a) This passage is cited from p. 464.
20 L. J. (M. C.) 140, (*Reg. v. The*
South Eastern Railway Company). 130.

(b) 15 Q. B. 353; ante, Vol. 6,

(c) 15 Q. B. 379, 1085; ante, p.

valuable. Also it is clear that no tendency to create profit is rateable; no tenant would pay rent for a tendency to profit unless it resulted in profit; and certainly no tenant of the part of the line in Dorking would pay rent to increase the profit of some other tenant of some other part of the line.

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As was mentioned in the case of *The Newmarket Railway Company*, Apprs., *The Churchwardens and Overseers of St. Andrew-the-Less, Cambridge*, Resps. (a), in this Term, the annuity paid for the purchase of the line is no evidence of the rateable value where the profit is ascertained; it may afford a distant presumption when the profit is unknown; but, as a general rule, the cost of the production, or the price paid for the purchase, whether it be a sum or an annuity, is immaterial to shew the rateable value. The question is, what rent would a tenant pay for it from year to year when the rate is made; and, in considering that, the tenant would disregard the cost price. It is also clear that the profit during the year in which the rate is made is the material fact for the guidance of the parish in making the rate, and they must use the latest information, and adapt the rate thereto. In *Reg. v. The London, Brighton, and South Coast Railway Company* (b), the rate was made in November, based on a calculation of profit founded on the half-yearly return down to the preceding June; and in the interval between June and November the Company had expended 100,000*l.* on their plant, and claimed an allowance for that expense: and it was held that they were entitled to it, the Court saying that "the overseers, in making a prospective rate, are to make it on the supposed prospective value, ascertained by them, as well as they can, from the latest evidence in their power as to antecedent value" (c).

With respect to the first rate, made during the lease at

(a) Ante, p. 858; 3 E. & B. 94. (c) 15 Q. B. 367, 368; ante, Vol.

(b) Ante, Vol. 6, p. 440; 15 Q. B. 477.

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£1,000. per annum. it is clear that the rent which is paid at the time of the rate is presumptive evidence of the rent at which it would let at that time; and it is also clear, that whatever may be the profit from the tenement, if, by reason of competition or otherwise, a higher rent could be obtained than the profit would warrant, it is to be rated at the rent which could be obtained. But the presumption from the amount paid may be rebutted. Thus, if an open coal mine be let at a rent, and it be proved that the mine has become exhausted, it is not to be rated at the rent agreed for while it was productive; and so, if an unopened coal mine was let at a rent agreed for on the speculation that it would prove productive; if nothing was obtained, the rent would be no evidence of rateable value. Here the rent was agreed on before the railway was tried, upon a speculation of profit, both immediate on the line and mediate through feeding the trunk line; and if this speculation turned out a failure, the rent agreed for on that ground would be no proof of rateable value, and the presumption from the rent would be rebutted. But, with respect to the first rate, it is found that the line at the time was an object of competition to several lines, who would be willing to pay more than the profit would warrant; the rateable value, therefore, would be the rent which it would let for under this competition; and that rent would be the rateable value of the whole line, and would be to be apportioned among the parishes on the line in proportion to the length therein.

My answer to the first question, therefore, is, that with respect to the first rate, a reference should be made to ascertain what rent could have been obtained for the line at the time of the rate; and with respect to the second rate, that a reference should be made to ascertain the rateable value, upon the principle above described; and I have thus disposed of all that was material in the questions submitted. But as the Judges differ on the question whether

a railway can be rated for more than it produces in the parish, on account of its tendency to make profit elsewhere, which is expressed by a metaphor from feeding, and on the question whether, in a case for apportionment, one parish in making its rate can disregard the portion of other parishes within the apportionment, and as a generality cannot be tested without a specific application, I suggest, if a case is again brought up relating to these points, that it should state specifically what is the railway profit arising out of the parish which is liable to be rated within it.

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COLERIDGE, J.—This case raises two questions upon two separate rates. The facts existing when these rates were respectively made slightly differ; and, in considering the points to be decided on each, I will notice the difference.

The appellants were an existing Company, with a line formed from London to Dover, when the Reading, Guildford, and Reigate Company was incorporated by Act of Parliament, for the purpose of forming a line from the Great Western Railway to the appellants' line; and the Act authorised the new Company to lease their line to the appellants. Before the line was completed, the two Companies appear to have negotiated as to the terms of the lease. First, it seems that the appellants had agreed to give 4*l.* 10*s.* per cent. on a capital not to exceed 600,000*l.*, and half the profits of the line. Then it was arranged to commute this for 5*l.* 10*s.* rent, without any share in the profits. Ultimately, on the completion of the line, the negotiations terminated in a lease for one thousand years, at a rent of 33,000*l.*, clear of all rates and charges, except income tax; and the lease also provided that the appellants should take on themselves the payment of 4*l.* per cent. interest on a bond debt of 200,000*l.* incurred in making the line, amounting to 8,000*l.*; so that the appellants were substantially to pay 41,000*l.* a year for the occupation of the new line.

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The appellants took possession of the line in connection with the railway. They are the sole occupiers of the land exclusively thereon the business and goods. For the distance of 341 chains upon the said line, which, founding their assessment on the rent of the whole, they demand a rate of 2,228*l.* 2*s.* 6*d.*, and demand a rate of 2,228*l.* 2*s.* 6*d.* the said rent is "the proper criterion" it is agreed that the assessment is correct.

I have had much doubt as to the correctness of the assessment in the use of this language. The amount of the rent, the rent being exclusive and conclusive, by way of arithmetical calculation, the result is ascertained, then I should think the assessment is wrong, and that the assessment is correct. The rent agreed for and paid is evidence, more or less strong, of that supposed rent, from which the value is to be arrived at; and, if there be nothing to set it aside, it is conclusive. Still it is true that there are any other circumstances in the inquiry, it never can be conclusively determined. Upon the best consideration, as I have said, after much deliberation, I conclude that the parish officers are governing test; and there is no principle, and

The second rate now brought in by the appellants' undertakings in 1852, the appellants' undertakings

ing, Guildford, and Reigate Company were amalgamated, the lease came to an end, and the latter Company was thenceforth absolutely and for ever to be deemed part of the original undertaking of the former Company. By the same Act, the appellants were to pay to the shareholders of the Reading line 40,000 perpetual annuities of 1*l.* 0*s.* 6*d.* each, making altogether 41,000*l.*, “ by way of commutation for the yearly rent and other yearly sums payable under the lease.” In making the rate for 1852, after the passing of this Act, the parish officers have taken the value of the 341 chains at 5,040*l.* 10*s.*, and assessed the appellants at 420*l.* 0*s.* 10*d.* Though it is not expressly stated, yet I infer, from the question proposed for our opinion, that they have done this on the ground that the value is increased simply by their now forming, not part of an independent line demised to the defendants, but an integral part of the main line. I come to this conclusion because no other change of circumstances is stated in the data for ascertaining the rateable value in the two assessments; and, as far as I understand the facts, they raise a very strong presumption against any increase in the rateable value being consequent upon this change. The annuities seem to me merely substituted for the rent, as another denomination of the same amount. I do not say that the occupation in Dorking might not be more valuable by reason of the amalgamation, but there is no evidence stated to shew that it is so; and the presumption is against it, from the equality of the rent and annuities. This rate, then, only adds to the faulty principle on which the first has been made another, and therefore, I think, cannot be affirmed.

I answer, therefore, the first question, as to both rates, in the negative.

I understand the second and third questions to be intended to raise these points:—First: must the assessment be made only on the net profits earned by the passage of goods and passengers over the land occupied in Dorking,

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and must any additional value which truth, may have, as increasing the traffic be excluded? Secondly: may any addi the occupation of the land in Dorking m of the amalgamation of the two lines, assessment? The two questions, I pre with a view to the different circumstance two rates were made, in respect of the ar

My answer to these questions will be t be excluded which, I do not say has a t (for of this no notice can be taken), l adds to the value of the occupation, fo regulated in amount by that value; an which I believe to be established by n that the inquiry is not so much *where* occupation are produced, as whether any so directly referable to it as properly to t of the profits of the occupation; or, to : Mr. Cripps in his sensible essay on the able value within the parish may depend out the parish" (a). I am not aware with any decision. This principle was t acted upon in regard to railways in *R* and *South Western Railway Compa* regards them, that case has been a gc ever since, from which I should be ve As I understand the two *Tilehurst cas* decided in either that at all breaks in t tainly intend to adhere to both of tho principle, indeed, was well established as *River case*(d); and I have long cons

(a) "How to rate a Railway," *Railway Co*
p. 3. ante, Vol. 4

(b) 1 Q. B. 558; ante, Vol. 2, 379, 1085; a
p. 629. (d) *Rev v.*

ed, that we are to apply the same principles to the
g the occupiers of railways as of any other property,
gh the application may be, in some respects, much

difficult, and the results not always so certainly
ned. I by no means say that either the increase of
raffic on the main line, or the amalgamation of the
ines, has actually the effect of increasing the value of
ccupation of the land in Dorking. That is purely a
ion of fact, with which we have nothing to do; and

fact, from either cause, such increase takes place, I
not prepared to point out to the parish officers how it
be ascertained or measured, or how it is to be dis-
vished from the general profits of the occupation in the
shes on the main line. That, again, is not within the
vince of the Court. It may well be that such increase
y exist, and yet it may be so unimportant, or so difficult
ascertain, that, as mathematical accuracy in a rate is
er to be expected, it may be more prudent, on the
ple, for the parish officers not to press it into the
ation.

But subject to the effect of these remarks, (which I make
more distinctly because I consider it of great import-
e for this Court always to abstain from expressing
ions on mere matters of fact, and to confine itself to
ing down principles in questions of rating,) my answer to
second question is this—That the assessment may, and
eed should, be made with respect had both to the rent
. to any increased value which the occupation in Dork-
may have by increasing the traffic on the main line.
d I give the same answer, in effect, to the third question
That the respondents may and ought to take into consider-
on the value of the occupation as an integral part of the
in line, in both cases, as I have already stated, if they
. ascertain that the value is increased thereby, and in
portion as they find it increased thereby. It will be ob-
ved that in both cases I slightly alter the wording of the

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questions to what I understand to be the meaning they were intended to convey.

It has been objected, that these principles, when applied to railways, may lead to double rating, because the same proprietor may be assessed in respect of the same profits in two parishes. I do not understand how the principle of rating can differ, where there is one and the same occupier in two parishes, from where there are two or more occupiers. If the occupier be the same, the properties are necessarily different in respect of which he is rated, and for this purpose he must be considered as a distinct person in each parish in which he occupies. In each parish the overseers will rate him in respect of the property in that parish; and they will estimate its value by what it produces, not merely there, but anywhere; if the profits of some other land in his occupation in another parish are mixed up with what the land in their parish produces, that ought to be the ground of a deduction from the assessment, and if not made, the rate may be excessive in amount. It may be impossible to do this with mathematical accuracy; but to do it is the business of the parish officers in the first instance, of the Sessions in the second, but never of this Court.

If in the case of the *New River* (a), the parish officers of Islington should assess the Company looking only at the total profits received in their parish, and making no separation of, or allowance for, that share which was properly referable to Amwell, and rateable there, they would overrate, and an appeal would lie: but this would be no ground for diminishing the rate in Amwell; for the excess in Islington ought to have been appealed against. If it had been, we must presume redress has been afforded; if it has not, the Company has acquiesced. Either way the parish officers of Amwell cannot be affected by the course pursued.

(a) See 1 M. & Sel. 503.

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sued by those of Islington. How can that case be distinguished from this? The land and the water have a rateable value in Amwell, considered merely as such, but it is small; they contribute, however, with other land and water elsewhere, to produce great profits, which are reaped, as it were, in Islington, and they are rated for the amount of this contribution. In Islington there is also land and water, and there the great mass of the profits is ostensibly produced; but the overseers there ought to separate from the portion on which they are to rate the portions which are really earned by the land and water in Amwell and the other parishes intervening. So, here, the land in Dorking has per se a rateable value, but it is said to contribute to produce with other land in other parishes great profits at the London terminus of the main line; and the occupier in Dorking has the contribution included in the rate on his land in Dorking, which therefore ought not to contribute to the rate in any other parish. Could the exact amount of that contribution be ascertained easily, not a doubt could exist that such rating was on a fair principle; but the difficulty of ascertaining the amount, surely, can make no difference in the principle? To clear up that difficulty, whatever it may amount to, is not the province of this Court, but of an accountant.

Under the circumstances, therefore, it will be necessary, in my opinion, to send both rates to an arbitrator, to ascertain the proper amount according to the principles I have laid down.

Lord CAMPBELL, C. J.—It seems to be most convenient to begin with the second question submitted to us in this case; and I am of opinion that the liability of the appellants to be assessed to the relief of the poor in the parish of Dorking in respect of the portion of the Reading line in that parish cannot be confined to the net profit derived by the

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appellants from the traffic passing through that parish. They are only to be assessed in that parish in respect of property occupied by them in that parish; but its value in the parish may be enhanced by circumstances existing out of the parish. The appellants say truly that they are not to be rated in this parish for profits made elsewhere. I wish implicitly to abide by what is called "the parochial principle" of rating; but upon that principle we must see of what value the property rated in the parish is to the occupiers; and this is not necessarily determined by the pecuniary receipts for the use of it within the parish. The rent that was paid by the appellants is strong evidence that it was of greater value to them than the mere net profit from traffic upon it. We have an express admission that "the Reading line brings a great deal of additional traffic to the main line;" and that "they derive benefit from the Reading line as a feeder to the main line in respect of traffic conveyed upon that line;" and that "the Reading line, if in the market, might be an object of competition between the South Eastern Railway Company and other railway companies, the traffic on the main lines of which would be increased by the possession and control of the Reading line;" therefore, plus the net profit derived from the traffic passing through the parish of Dorking, the appellants do derive a profit from the occupation of the portion of the line in that parish. But it is said, that in respect of this last profit they ought only to be assessed in the parishes through which the main line passes. I am of a contrary opinion. This profit, although not received for the traffic upon the line in the parish of Dorking, originates from the occupation by the appellants of land in the parish of Dorking; and if they are assessed in that parish in respect of this profit, in estimating their profits in the parishes through which the main line passes, there ought to be a deduction in respect of what is paid for the line which is worked as a feeder to the main line. This calculation, though difficult, may be made

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upon data which are accessible, and is not more difficult than calculations which must be made in railway rating, where stations and inclined planes in one parish affect the traffic in another parish. Adhering to the parochial principle, I inquire of what value the land rated is to the occupier. Of this value the rent he is willing to pay for the land affords evidence, and from any profit which he indirectly makes from it out of the parish, part of the rent which he pays for it in the parish is to be regarded as a deduction. At the bar it was hardly denied that this would be the result if the two railways belonged to different Companies, and if the Company whose railway is fed were to pay a regular fixed annual sum to the Company whose railway is the feeder; but I do not see how it should make any difference to the parish of Dorking that both lines are occupied by one Company and are worked as one concern. The advantage derived from the occupation of the portion of the line in that parish is still the same, although the process by which the amount of that advantage is to be calculated is changed. I adhere to the rule of rating which I laid down in *The Newmarket Railway Company v. The Churchwardens and Overseers of St. Andrew-the-Less, Cambridge*(a), and which I there attempted to support and illustrate. This, I think, is in entire harmony with our decision in *Reg. v. The Great Western Railway Company*(b). In many cases the supposed advantage derived by a Railway Company from a portion of a line in a particular parish bringing passengers and goods to another portion out of the parish may be almost inappreciable, and I would earnestly dissuade parishes from ever making any claim under this head, unless where upon clear evidence the claim can, in point of fact, be established. In answer to the third question, I say that the respondents are not entitled to treat the Reading line as an inte-

(a) Ante, p. 858; 3 E. & B. 94. (b) Ante, p. 130; 15 Q. B. 379, 1085.

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gral part of the South Eastern the parochial principle; but th the assessment the value of the lants beyond the traffic passing king.

In answer to the first ques rent under the lease. or the an Act of Parliament. is necessari able value.

And therefore—according upon between the parties if tl the matter must go back to tl arbitrator. to determine the p in conformity with the opinion of the Court upon the second

The case to be refe

(a) In *Regina v. The Eastern Counties Railway Company* (15th January, 1854), the Court (Lord Campbell, C. J., Coleridge, J., and Wightman, J.), quashed a rate based solely on the rent paid by the appellants as the tenants of

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COURT OF CHANCERY.

BEFORE VICE-CHANCELLOR STUART.

Re THE KENDAL AND WESTMORELAND RAILWAY ACT
and BRAITHWAITE'S TRUST.

April 11th.

THIS was a petition praying the investment of a sum of 9,103*l.*, cash in the Bank, which had been paid in as the purchase monies of lands in settlement, taken by the Kendal and Westmoreland Railway Company.

Brokerage in respect of an investment of purchase money in Court, ordered, with consent of petitioner, to be paid by her, and to be repaid to her by a Railway Company.

A question arose as to the manner in which the brokerage, payable in respect of the investment, was to be repaid to the petitioner, the tenant for life under the settlement.

Mr. *Dickinson* suggested that the order should be in such a form as to enable the petitioner to pay the brokerage, and that the Company should repay the amount to her.

Mr. *Nalder* for the Railway Company.

The VICE-CHANCELLOR having approved the suggestion, the order was drawn up in the following form:—

“IT IS ORDERED, that the whole sum of 9,103*l.*, cash in the Bank, to the credit of *Ex parte the Kendal and Westmoreland Railway Act, 1845*, be laid out in the purchase of, &c., without deducting brokerage (the petitioner, by her counsel, undertaking to pay such brokerage), in the name of, &c. And it is ordered that the said Kendal and Westmoreland Railway Company pay unto the petitioner, S. B., the amount of the brokerage on the purchase of the said, &c., to be paid by her as hereinbefore mentioned, and her costs, including therein all reasonable charges and expenses incidental thereto, of the purchase or taking of the lands in the petition men-

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THE KENT AND WEST-SUSSEX RAILWAY ACT.

incurred by the said Company, or which have been incurred in consequence thereof other than such costs as are by the Lands Clauses Consolidation Act otherwise provided for, or as have been previously paid, and of the investment of the said money in the said Bank of England, and of obtaining this order."

BEFORE VICE-CHANCELLOR KINDERSLEY.

July 1874.

PEARCE v. THE WYCOMBE RAILWAY COMPANY.

A Landowner filed his bill and applied for an injunction to prevent a Railway Company from prosecuting their works on his land, upon which they had entered without notice and without his consent, and which lay within the limits of deviation. On the hearing of the motion, it was ordered to stand over for the decision of the Board of Trade. The Board of Trade decided in favour of the Company.

The Court

refused to give the plaintiff the costs of the motion.

The Court can make an order as to the costs of a motion, although the motion may not have included any mention of costs.

THIS was a question of costs, arising out of the following circumstances:—

The Wycombe Railway Company, by their Act, 9 & 10 Vict. c. cccxxvi., with which the Railways, Lands, and Companies Clauses Consolidation Acts, 1845, were incorporated, authorised the Company to make and maintain their railway on the line, and upon the lands delineated on their plans, and described in their books of reference(a).

The Company, in the formation of their railway, transgressed the limits of deviation, and entered upon the plaintiff's land without his consent, and without notice, causing as he alleged, injury to his dwelling-house and property. The plaintiff thereupon filed his bill, praying an injunction; and when the motion came on for hearing, both parties agreed that it should stand over until the question of deviation had been submitted to the Board of Trade, in accordance with the 66th section of the

(a) The 21st section of the Wycombe Railway Act, 9 & 10 Vict. c. cccxxvi. was as follows:

"That nothing in this Act contained shall authorise the Company to make any lateral deviation into any lands not

mentioned upon the said plans, or being numbered thereon, and not described in the said books of reference, without the consent in writing of the owner and occupier thereof."

ys Clauses Consolidation Act (a). It was further by both parties, that no objection to the jurisdiction of the Board of Trade should be taken by either side; and, that if the Board of Trade should refuse to enter the jurisdiction, the defendants and their counsel would stand by such order as the Court might make, with regard to any works they might prosecute, without prejudice to appeal.

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he 66th section of the Clauses Consolidation Act, 1863, is as follows: "Whereas expense might be avoided, and public convenience promoted, by a reference of the Board of Trade upon construction of public works of an engineering nature connected with the railway, where compliance with the provisions of this or the Special Act would be impossible, or attended with inconvenience to the Company and without adequate advantage to the public: be it enacted, that, in case any difference of opinion shall arise with regard to the construction, or restoration of a road, or bridge, or other work of an engineering nature required by the provisions of this or the Special Act, between the Company, its trustees, commissioners, or other persons having the control of or being authorized by law to enforce the execution of such road, bridge, or work, it shall be lawful for any party, after giving fourteen days' notice in writing of their intention so to do to the other party, to apply to the Board of Trade to decide upon the proper manner of constructing, altering, or restoring such road, bridge, or other work; and it shall be lawful for the Board of Trade, if they shall think fit, to decide the same accordingly, and to authorize, by certificate in writing, any arrangement or mode of construction in regard to any such road, bridge, or other work which shall appear to them either to be in substantial compliance with the provisions of this Act and the Special Act, or to be calculated to afford equal or greater accommodation to the public using such road, bridge, or other work; and after any such certificate shall have been given by the Board of Trade, the road, bridge, or other work therein mentioned shall be constructed by the Company in conformity with the terms of such certificate, and, being so constructed, shall be deemed to be constructed in conformity with the provisions of this and the Special Act: provided always, that no such certificate shall be granted by the Board of Trade, unless they shall be satisfied that existing private rights or interests will not be injuriously affected thereby."

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The Board of Trade having decided in favour of the Company.

Mr. Swanton and Mr. Nichols now asked for the plaintiff's costs of the original motion, on the ground that, although the decision of the Board of Trade was in favour of the Company, as to the injury likely to result from the works in question, yet that the proceedings of the Company had, in the first instance, been illegal and improper, and the plaintiff would have been entitled to his injunction if he had persisted in his motion.

Mr. Malins and Mr. Jessel, for the Railway Company, opposed the application for costs, on the ground that no mention of costs was made in the original motion, and that no application for costs had been made on the former hearing; and also on the ground that the result of the inquiry before the Board of Trade shewed that the proposed deviation of the line would rather be a benefit than an injury to the plaintiff.

The VICE-CHANCELLOR.—It was agreed between the parties that the reference to the Board of Trade should not prejudice the right of appeal; so that, whatever order I may now make, both parties may still appeal, notwithstanding the permission to the defendants to continue their works. Now, what is asked, is, that I should direct the costs of the motion that was made for the injunction to be paid by the defendants. Of course that does not include the costs of the suit. Now, the defendants say, in this stage of the proceedings, the Court has no jurisdiction to decide that question, unless new notice of motion is given; for the present notice of motion says nothing about costs. But I think the Court can nevertheless make an order as to them. The Board of Trade decided in favour of the deviation, and that it was advantageous to the plaintiff's interest.

Now, it is suggested that this decision may have been come to thus: the works having been prosecuted, it would have been a great hardship on the Company to remove them. The very terms of the order under which the matter went before the Board of Trade were, that the defendants should be at liberty to prosecute their works, undertaking to abide by such order as the Board should make. Therefore it appears to me that I must consider the decision of the Board of Trade as binding and conclusive on both parties. On the one hand, according to that decision, the Company have not made a deviation which, as regards the plaintiff's interest, was improper; on the other hand, the Company have made a deviation from the limits permitted by their Act, and did not give the notice required by it.

In that state of things, and having regard to the two views,—the one in favour of the Company from the decision of the Board of Trade, the other of the plaintiff, by reason of no notice having been given of the deviation—the question is, what I ought to do with the costs of the motion for the injunction. I am of opinion that I ought simply to make an order referring to the previous order in this Court and to the decision of the Board of Trade, but to give no costs on this motion.

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BEFORE THE MASTER OF THE ROLLS.

THE DUKE OF BEAUFORT & PATRICK and Others

THIS suit was instituted by the Duke of Beaufort against H. Patrick, J. F. Calland, A. P. Calland, R. D. Woodfield, the Mayor of Worcester, and the Attorney-General, to restrain the first four defendants from obtaining possession of a piece of land about 1372 yards long, and nine yards wide, containing about three acres, being a portion of what is called the Swallow Canal. The land itself was of copyhold tenure, held of the manor or fee of Trewyddia, which the Duke of Beaufort were the lords during the reign of Henry the Third, and which was the land in question in this case (4).

On the 15th of November, 1779, a lease of this land on a term of sixty-five years, from Michaelmas in that year was granted to J. Morris by J. P. Popham, the owner of the property. The lease had also obtained a grant of a private way over the land of Trewyddia from the High Court of Chancery, and he and his partners had erected a mill on the river, and they for the purpose of conveying the water made a cut or private canal through their land.

This was done on the night 2-20-72. The 1st of the 1972 batch of the 1972 batch of the 1972 batch was made there.

mised by J. B. Popkin, and the residue, 1048, through the Duke of Beaufort's waste. No power of disposal was contained in the lease of the 15th of 1779; but, from the facts (which are stated in it), it was reasonable to infer that such cut or trade with the leave and license of the lessor, and that he consequently could not have made thereof pending the lease.

A Company was formed, under the authority of an Act for making a canal, to be called the Swansea Canal, which the private cut or canal made on the fee simple was to form a part, but it was to be improved, enlarged, so as to make it correspond in dimensions with the rest of the proposed canal. In May, 1794, the 3d, c. cix., authorising the canal, was passed.

That through the manor of Trewyddfa, belonging to the Duke, the Canal Company should have no power to make the canal, but that the duke should be empowered, at his own costs and charges, within two years after the passing of the Act, to make and maintain the canal through that manor between certain specified points, and the same powers were given to the duke for the same as were given to the Canal Company for the other parts of the canal.

The Swansea Canal was opened for general traffic in the portion through the manor of Trewyddfa was altered and widened, according to the dimensions specified in the Act, till after the month of August, 1797, an agreement for that purpose was entered into between the Duke of Beaufort and the lessees.

The agreement was then or subsequently come to with J. B. Popkin, by which the value of that reversion in the lands was ascertained and paid for. The lease for 99 years expired on the 29th of September, 1844, afterwards the first four defendants on the re-

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the petition to recover the same as upon the present bill was filed, to stay the action of ejectment, to restrain the instituted proceedings at law, and to compel the defendants to execute proper conveyances to the plaintiff, on what, if anything, was due to them for compensation under the provisions of the Swansea Canal Act, or an injunction to restrain the defendants from obstructing the use of the canal.

The arguments of counsel and the facts stated in the judgment.

The *Solicitor-General*, Mr. W. M. J. Craik, for the Duke of Beaufort, cited *Devonshire v. Eylin* (a), *Jackson v. Cat*, *Spurrier* (c), *Powell v. Thomas* (d), *Preston v. Toulmin v. Steers* (f), *Daniels v. The Proprietors of the Stourbridge Canal* and *Rex v. The Commissioners of the T. Navigation* (i).

Mr. Campbell for the Marquis of Worcester.

Mr. Wickens for the Attorney-General.

Mr. Roundell Palmer and Mr. Pember.

Woodifield, cited *The Rochdale Canal Company v. G (a)*, *Wood v. Veal (b)*, *Protheroe v. Forman (c)*, *Harn v. Nettleship (d)*, *Chuck v. Cremer (e)*, *The Durham & Sunderland Railway Company v. Wawn (f)*, *The Ter and Fellows of Clare Hall v. Harding (g)*, and *ing v. Armitage (h)*.

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THE MASTER OF THE ROLLS (after stating the facts as inbefore set forth) proceeded with his judgment as follows:—

April 16.

It is necessarily admitted on both sides, that at law the plaintiffs are entitled to the possession of the land covered by the 1372 yards of the canal. The question before me is, whether the facts of this case do not show an equity which this Court will enforce by preventing defendants from exercising their legal right; and if so, whether the Court will, in so restraining the defendants, cause any loss upon the plaintiff any, and if any, what conditions. In other words, the question I have to determine is, whether there has been such an appropriation of this land to the public as binds the defendants in equity from dispossessing it; and if this be established, whether the defendants are entitled to any compensation, and if any, on what principle.

The plaintiff contends, that, inasmuch as the lands sought to be recovered were included in the maps and plans of reference deposited with the clerk of the peace, and were part of the lands authorised by the Act to be taken, and as everything that was done by the duke is shown to have been done with the full consent and approbation, and in accordance with the wishes, of the owners and proprietors, which class includes J. B. Popkin (the

2 Sim. N. S. 78.

5 B. & Ald. 454.

2 Swanst. 227.

2 My. & K. 423.

(e) 2 Ph. 113.

(f) 3 Beav. 119.

(g) 6 Hare, 273.

(h) 12 Ves. 78.

the land to the undertaking, still the which the defendants can enforce is, to reasonable compensation. All presumption arising from length of time is excluded by the special verdict, that no satisfaction was made, or agreed to be made, by the proprietors of the lands in question.

The defendants contended, first, that appropriation to the public of this por secondly, that nothing which had been done in such a manner as to affect J. B. Popkin, that even if J. B. Popkin were bound, he not claim under, and were in no respect. On the first point, it was urged, that the manor of Trewyddfa was not made under the Act, for that the statute, by the 14th, that the canal should be made within a passing of the Act, and limited the time that period; that, consequently, the Act ceased on the expiration of that of its provisions have no bearing on the and that as the canal was made, so it obtained, if at all, by arrangement between Beaufort and the proprietors of the land the construction: the final clause control

ag or refusing shall pay to the other the sum of per annum until the same shall be made and completed, and so in proportion for any less time than a year." could not have been the intention of the Legislature to impose payment of the perpetual annuity of 500*l.* in the canal was not completed in two years, which would be the result of holding that when two years had elapsed it could not afterwards be made under that Act. In my opinion the real meaning is, that the time was limited, but with this proviso, that if it be not completed in two years, a sum shall be paid by way of penalty for access beyond that period, at the rate of 500*l.* per annum.

On the second head, namely, whether J. B. Popkin was bound by what took place, it was contended by the plaintiff, that he was so bound on the principle of *Dann v. Spurrier*, which was so decided, that he who stands by and encourages an act, cannot afterwards complain of it, or interfere with the maintenance of that which he has permitted to be done. This general proposition, is not disputed by the defendants; they deny the application of the principle; and draw a distinction to be found in *The Master, &c.*, of *Clare v. Harding*, and *Pilling v. Armitage*, where it was decided that the encouragement given to a lessee will not affect the reversion, or give the lessee, or any one claiming under him any additional rights, because he knew what his title was, and what his length of tenure in the land was. The distinction, therefore, given by the landlord to the lessee cannot bind or affect the reversioner. I admit the distinction, and concur in the principle of the last-mentioned cases, but it is not applicable to this. A cut or private canal had been made by the lessees, with the sanction of J. B. Popkin. It could not bind his reversion, and at the end of the term he might recover his land. But this canal was not of the dimensions required by the Act, although it was, when increased and widened, to form a portion of the canal authorised

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of the value which is to pass through it.
This extension and improvement of the c
manor of Trewyddfa also took place by
between the Duke of Beaufort and the les
pose of making it correspond with the re
and an arrangement was made between
division of the tolls to be taken by the
agreement of the 9th of August, 1797, w
were the stipulations therein contained, ir
or authorised by the lease of November,
pressly found by the special verdict, that
by the duke was done with the full cons
tion of, and in accordance with the wish
and proprietors, of whom J. B. Popkin wa

It would, therefore, be contrary to the p
to which I have referred, if I were to con
and consent to the arrangement between
his tenant, by which the original cut was r
mit J. B. Popkin, the owner of the proper
tioned the improvement and widening of t
his land, so as to make it correspond with
required by the Act, and who had known
the division of tolls, which could only be
thority of that Act, to assert that he mea
to be temporary only until the lease to
parties to the agreement had concluded

d, and so far as regards the persons claiming through him and they must be held to be bound to this extent he is not entitled to obtain possession of the land by the canal, or to interrupt or interfere with its use. The next question is, whether the defendants are bound by the contracts of J. B. Popkin, and if not, whether they are bound by any separate and independent circumstances, which make it inequitable that they should be allowed to exercise their legal rights, and obtain possession of the land traversed by the canal. To determine this, it is necessary to refer to the circumstances attending the title of the defendants. The estate of which J. B. Popkin was seised was called the best estate; it included certain freehold hereditaments and also the copyholds in question, which were part of the manor of Trewyddfa. In the year 1771, Sir Watkin and his wife filed a bill in Chancery, apparently for relief against J. B. Popkin and P. Methuen, and by a decree made in April, 1774, part of the freehold portion of the best estate was allotted to Sir W. Lewis and his wife, and the costs of all parties were thrown on the residue of the estate. In August, 1783, J. B. Popkin mortgaged the copyholds in the manor of Trewyddfa to A. Wallace, and obtained a surrender of them for that purpose. In 1784, Sir W. Lewis filed a bill against J. B. Popkin and A. Wallace to foreclose a mortgage made to him of the Forest of Dean, and A. Wallace also filed his bill for the purpose of redeeming the copyhold hereditaments included in his mortgage. Two orders were made in the cause of *Lewis v. Popkin*, one of November, 1793, before the Act for making the Swansea Canal had passed, and the other in July, 1794, after the passing of the Act (a), by which all the Forest of Dean, both freehold and copyhold, were ordered to be sold by public auction, which was accordingly done. Under the first order the defendant J. B. Popkin was the purchaser. The

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The Swansea Canal Act received the Royal Assent on the 22nd of July, 1794, 34 Geo. 3, c. cix.

I. O O O

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biddings were opened, and the declared the purchaser; but the more on the application of Sir J. Calland was declared to be on the 21st of June, 1800, and and was let into possession of the time in that year.

The particulars of sale and had been prepared after the Act passed, but before the canal had obtained a statement that the cost of the estate, in pursuance of the Act, would render the estate very valuable. It was duly paid by the lessees of the estate to J. Calland, the purchaser, in March, 1803, and from that time under his will, and who was the defendant. The purchase was made in the year 1827, when an order was made in all the three causes. J. B. F.

On this state of circumstances the purchasers are not bound by the fact so far as it appears by the fact that the testator had a knowledge of the facts. The plaintiffs are clearly bound by the fact that the testator, J. Calland; and I think, the plaintiffs could not, after his purchase, succeed that he was entitled to the canal after the expiration of the years. The particulars of sale expressly stated the intention to complete at a time when it had not therefore when the plaintiff knew of this Court must be taken to be that the canal was in existence. He bought the canal subject to the implied condition, that it was to be used for the bene-

that neither he nor his devisees, nor those who represent them, could prevent the enjoyment of this easement in future.

It is said that the defendants have no desire to interfere with the traffic on the canal, or the public use of it, provided the persons using it will pay to them a reasonable sum for the use thereof; but it appears by the Act that the defendants could not legally levy any toll; that the right to do so is vested in the Duke of Beaufort alone; and therefore the defendants, who could at law stop the canal, would have that means, and that only, by which they might, and unless restrained by this Court probably would, extort from the public such payment as they might think fit to exact, and which would be measured only by what the public might be content to pay, rather than have their traffic impeded or destroyed, by which means the very scope and object of the Act would be defeated, and the benefit to the public annihilated.

On the subject of compensation I have had more difficulty. The finding in the special verdict, and the letter of the Duke of Beaufort's agent on the 8th of January, 1808, (requesting information upon the subject of the consideration to be paid by the Duke of Beaufort for the land taken from J. B. Popkin's property), preclude the presumption which might otherwise have arisen of a conveyance of the reversion, and that J. Calland bought in the belief, and subject to the assumption, that such had been the case. But not merely does the special verdict negative any agreement for payment of compensation to the owner of the reversion in these lands, and not only does the letter of January, 1808, shew that the question of compensation was then under discussion and agitation between the devisees of J. Calland and the Duke of Beaufort, but the surrender of the property includes the whole of the lands mentioned in the particulars of sale published before the canal was made, and included the whole surrendered by J. B. Popkin to A. Wallace, in 1783; and including, therefore, the land occupied by the canal.

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Although, therefore, I am of opinion that the defendants cannot be allowed to obtain possession of that portion of the canal, or to interrupt the traffic upon it; yet they must be entitled, in my opinion, to receive some fair and reasonable compensation for their interests in the land, which this Court, in the circumstances of the case, will not allow them to take possession of.

The next question is, upon what principle is that compensation to be ascertained. It cannot be ascertained under the powers of the Act, for the 42nd section enacts, that the commissioners shall neither be obliged nor allowed to take notice of complaints of persons injured, unless made within three calendar months next after the damage shall have been sustained; and although some question might arise on the concluding words of that section, I think it would not be possible to call out the powers of the commissioners. I must, therefore, myself determine on what principle the compensation is to be assessed; that is, whether the plaintiff ought to pay what the value of the reversion was in 1797, when possession of this land was taken under the statute, or whether the present value of the land should be ascertained.

I think that the compensation cannot be fixed on the principle of what the value of the reversion was in 1797. The late Duke of Beaufort, under whom the plaintiff claims, might then have ascertained the value under the powers of the Act, and have paid or tendered it to the persons entitled. He cannot obtain any advantage by having abstained from so doing; he has, in fact, taken and paid for, either in money or by the agreement of 1797, the residue of the lease of 1779, so far as it comprised land covered by the canal; but he has not paid for the reversion subject to that lease, and he has waited for this purpose till the lease has expired. Until that period had arisen there was no mode by which the purchasers of the reversion could have enforced payment. If, under the 44th section, they were bound to complain within three

months after the canal was completed, they could not have proceeded by injunction, because they had sanctioned the making of the canal; and after it was completed, the use of it would not have been waste.

It is true that they might, within three months after the completion of the canal, have applied to the commissioners for compensation, and so also might the Duke. Possibly, as was suggested at the bar, the smallness of the sum prevented them from having recourse to the process; but the same principle must regulate the decision of the Court whether the value of the reversion be large or small. During the whole of the time that has elapsed, the money which ought to have been applied in paying the owner of the reversion has been in the pocket of the Duke and of those who claim under him; and during the whole of that time also the reversion in the property has been gradually increasing in value. It is true that the plaintiff cannot be charged on the principle of compound interest, but he has waited till the property he required for the use of the canal had ceased to be reversionary, and therefore increased in value, as it now exists.

It appears to me that the present case is analogous to what occurs under the modern Railway Acts. The Company has power to take additional land at a future time for the station, or some other purpose. They do not feel at first the want of it, and they delay taking it for several years; in the meantime the value of the land has risen. The Company must, in my opinion, pay for such increased value, although, if they had taken the land when they had first the power of doing so, they would have paid less than one-half of the increased value. The circumstance that the Railway Company had bought up the interest of the lessee in the property, and had allowed the lease to expire before coming to any arrangement with the lessor, would not alter their rights, or enable the Company to say to the reversioner, "You shall receive now only the price

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for which the reversion might have been bought when the Company took the lease." I am of opinion, therefore, that the plaintiff must pay for the value of the land at the time when the reversion fell in. At the same time, I am of opinion that the defendants are entitled only to be paid the fair and reasonable value of the land, including the minerals, as if the same were not wanted for the purpose of the canal—not a fanciful amount, based upon calculations of possible advantages not in existence, or upon any supposed diminution of advantage to the rest of their property under what is usually called "severance." I am of opinion that I ought to fix the amount myself, and not send it to any other tribunal to ascertain the value.

I propose, therefore, to require the plaintiff and the defendants to lay before me evidence of the value in September, 1844, when the lease of the land occupied by this portion of the canal expired; and I am of opinion that it ought to be estimated as if it were a piece of land of that size and shape, lying perfectly detached from the rest of the defendants' land, having no unusual advantages of position; and of the agricultural value of the land adjoining the canal. When this is done, either by agreement between the parties, or by my decision on the evidence laid before me, I will make a decree, ordering, that upon payment of the sum so ascertained, to be stated in the decree, and interest upon it at 4*l.* per cent. per annum, from September, 1844, the defendants are to execute all proper conveyances of the land so taken, to be settled by me in Chambers in case the parties differ. I must also continue the injunction already granted in this case. With respect to the costs, I shall not make any order. Each party has claimed more than they were severally entitled to, and they must bear their own. The plaintiff, however, must pay the costs of the Attorney-General; and I do not intend to relieve him from the costs of the action at law.

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BEFORE THE LORDS JUSTICES.

Ex parte LORD HARDWICKE.

Jan. 30th.

In re THE ROYSTON AND HITCHIN RAILWAY COMPANY.

THIS was an appeal from an order of the Vice-Chancellor of the County of Middlesex, directing the payment of interest upon purchase money of land agreed to be purchased by the Royston and Hitchin Railway Company for the purposes of their Act, from the date of the agreement up to the day of investment.

On the 3rd of November, 1846, the Royston and Hitchin Railway Company, under the powers of their Act, with which the Lands Clauses Consolidation Act was incorporated, gave notice to the Earl of Hardwicke that they intended to take a portion of his land for the purposes of their railway, and offered to give 1700*l.* for the purchase of the same.

The Earl, by his solicitor, in answer to the offer, wrote as follows:—"I will, on his Lordship's behalf, agree to your offer of 1700*l.* for the 12*a.* 0*r.* 33*p.*, and the damage done by severance, interest at 5*l.* per cent. to be paid on the 1700*l.* from the time when the Company take possession of the land. It may be proper for me to add, that his Lordship is only tenant for life, with remainder to his eldest son and his heirs male, with divers remainders over, consequently the purchase money will have to be paid into Court; but I assume you are aware that his Lordship's estates were in settlement."

On the 8th of May, 1849, one of the solicitors for the Company, in reply to the foregoing letter, wrote to the Earl's solicitor as follows:—"If I find, on reference to the abstract of title, that the money must go into Court, it can be at once paid in, and the Company take possession of the land, reserving the verification of the title to a future opportunity

A tenant for life agreed to sell land to a Railway Company. There was delay in paying the money into Court, and further delay in investigating the title, and in the investment of the sum deposited. The vendor, by letter, stated that he should require interest at 5*l.* per cent. on the purchase-money until the completion of the purchase:—*Held*, that the vendor was entitled to interest up to the date of the investment of the purchase-money.

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Ex parte

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HANDWICK,

Re

THE ROYSTON

AND HITCHIN

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I assume, from what you say, that the deed is a minor."

The abstract having been made in 1849, one of the Company's agents proposed that the conveyance be made by certain trustees having a lien on the deposit of the purchase money in the joint bank of the Company and the Bank of England. In July, 1849, the Company deposited the purchase money into the Bank of England to the credit of the *Hitchin Railway Act*, 1849, and communicated the fact to the Earl.

The Company took possession of the land in July, 1849, the Earl's agent stating that the Company as follows:—"The Company will have to pay the rate of 5*l.* per cent, on the purchase money, on completion of the purchase, which cannot be invested, unless the Company, consequently an encumbrance on the title will be created to the Company. As Lord Handwick will receive 5*l.* per cent. interest on the purchase money, we, perhaps, have no reason to complain of the purchase, but we have to say to you, that interest will be paid frequently any delay in the adjustment of the title is detrimental to the Company."

Some delay occurred before the completion of the deeds, the solicitor of the Company stating that the matters were so pressing, that it was necessary to complete the purpose.

On the 3rd of October,

and on the 6th of November following the Earl's solicitor pressed the solicitor of the Company to conclude the business, and requisitions were made on behalf of the Company with respect to the title.

On the 17th of June, 1850, the Company, for the first time, disputed their liability to pay interest on the purchase money, by letter, stating that "the purchase and compensation money has, as you are aware, been paid into Court, pursuant to the Act of Parliament, from which time the Company ceased to be liable to the payment of interest."

On the 1st of July, 1850, the Company's solicitor wrote to the Earl's solicitor, proposing that the Earl should present the usual petition for the investment of the money in Court, and offering to consent on the part of the Company.

To this course the Earl's solicitor assented, without prejudice to the Earl's claim for interest on the purchase-money up to the completion of the purchase; and, accordingly, a petition was presented, praying that the sum in Court might be invested, and the dividends paid to the petitioner, and that the Company should, on or before the 20th day of January, 1852, pay to the petitioner interest on the purchase money from the 6th of July, 1849, up to the date of the investment.

The question was fully argued, and an order was made by Vice-Chancellor *Kindersley* in accordance with the prayer of the petition.

From this order the Company appealed.

Mr. Bethell and *Mr. Wickens*, for the Company, relied on the terms of the 69th section of the Lands Clauses Consolidation Act, and contended that the landowner was the person to apply for the investment of the purchase money, and that, if he neglected to do so, he, and not the Company, must suffer the consequences of the neglect: *Ex parte Cofield (a)*.

(a) 11 Jur. 1071.

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olidation Act, to petition for the investm
chase money.

Mr. Wickens replied.

Lord Justice Lord *Cranworth*, in the co
ment having expressed a doubt as to the j
Court to order the payment of interest w
money on an application of this sort, both
waive any objection to the jurisdiction, a
be bound by the decision of their Lordsh
way as if relief had been sought by bill.

Lord Justice Lord CRANWORTH.—I con
tain some doubt on this case, whether we
right in exercising jurisdiction in this m
the consent of both parties. Conceding
ever, I think the order which has been m
der the special circumstances of this cas
the 13th of July, 1849, which was writt
investment, and so near it as to be prop
interpreting the intention of the parties, c
sage: "We have thought it only proper to
interest will be payable and required."

agreements were so pressing that they could not make an appointment to examine the title deeds, it was not unreasonable for the vendor to suppose that the Company adopted his view, especially when negotiations went on for five months afterwards, without remonstrance by the Company. If they had said at once what they said afterwards, that they did not agree in the vendor's view as to its liability to interest, they might have had good ground for their present argument. As they did not do so, they rendered themselves liable to pay interest; and, as the parties submit to the jurisdiction of this Court, we think they must pay interest accordingly.

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Ex parte
 LORD
 HARDWICKE,
Re
 THE ROYSTON
 AND HITCHIN
 RAILWAY CO.

BEFORE VICE-CHANCELLOR TURNER.

LEWIS v. THE SOUTH WALES RAILWAY COMPANY.

Nov. 13th &
 17th.

THIS was a special case presented to the Court for the purpose of deciding the question, whether the South Wales Railway Company were or not liable to pay interest on a sum of 9,467*l.* 7*s.* 10*d.*, being the purchase money of certain lands taken by the Railway Company, after the time when that amount had been paid into the Bank by the Company.

The facts as stated in the special case and in the Vice-Chancellor's judgment were as follow:—

By an agreement, entered into between a tenant for life of certain settled estates and a Railway Company, it was agreed that the purchase-money should remain in the hands of Messrs. G., bankers, at the risk of the

Company, until the completion of the purchase, when the same should be paid over to the parties respectively entitled to the same, or be paid into the Court of Chancery, as the case might be; and that the Company should pay interest on the said purchase money, at 5*l.* per cent. up to and inclusive of the day on which the said purchase should be completed. The solicitors forwarded the engrossment of the conveyance to the vendor, and paid the purchase-money into Court, to the account of the Company's Act, but no petition was presented for payment.

The vendor sent in his charges and a calculation of interest up to the day on which the purchase-money was paid into Court; and two years afterwards sent in another account, with a calculation of interest up to that date. The Company disputed the right of the vendor to interest subsequently to the payment of the purchase money into Court:—*Held*, that, according to the true construction of the agreement, evidenced by the conduct of the parties, the intention of the purchase must be, the payment into Court of the purchase money by the vendors.

dants as confirming their interpretation of T. Lewis opposed the bill in the House negotiations were entered into, which resu ment, dated the 1st of July, 1845, bet Lewis and three of the promoters of t which, after reciting to the effect hereinl it was agreed, (so as to bind both the C the said three promoters in their private the Company should obtain their Act in should have occasion to take any of the la then, before taking any part of such la thereon for any purpose of the Company, (and set out the line), the Company, or els moters executing that agreement, should p for and in respect of the purchase of any and hereditaments taken and required by poses of the undertaking, and for and in r every permanent and other damage, by se wise, to the landlords or tenants, and also tion and injury which would be done to l and property of the said T. Lewis by reaso way passing through the property, and thereof, the amount of such purchase mon compensation to be estimated and determ

r by that agreement otherwise provided for ; and in
g the said award, the said surveyors and umpire re-
vely were "separately and distinctly to value and as-
1 and distinguish the amount of purchase money or
nsation respectively to be paid in respect of the lands
of T. Lewis was tenant for life, and in like manner
to which he was entitled in fee;" and to pay to him,
irs or assigns, the purchase monies for the lands to
he was entitled in fee, and pay and apply the
der of the purchase money according to the enact-
and provisions in the Lands Clauses Consolidation
1845, respecting purchase money or compensation
g to parties having limited interests; the Company
all costs of T. Lewis's opposition, and of and relating
agreement ; and it was agreed that within four weeks
Company obtaining their Act, they should give T.
an agreement to this effect, under their common seal,
the individual responsibility of the three promoters
the agreement was to cease.

Lewis, after the execution of this agreement, with-
his opposition, and the Company obtained their
) . They then gave notice that they would require
lands, and under the powers of arbitration in the
nent of the 1st of July, 1845, an award was made
r. W., the umpire, dated the 9th of March, 1847,
ich 1,295*l.* 14*s.* was awarded as the purchase money
ompensation in respect of the fee simple lands, and
7*s.* 10*d.* as the purchase money and compensa-
n respect of the settled lands. Soon after the date
award, the Company requiring immediate posses-
of the lands, another agreement was entered into,
the 6th April, 1847, by which, after reciting the
nent of July, 1845, and the award, and that the Rail-
company had applied for immediate possession, to which
ewis had agreed, upon the sums of 9,467*l.* 7*s.* 10*d.*

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This image shows a blank, aged, cream-colored page, likely an endpaper or flyleaf of a book. The paper has a slightly textured appearance with some minor creases and discoloration, characteristic of old paper. A small, dark, irregular mark is visible near the bottom center of the page. The left edge of the page shows the binding of the book, with some of the adjacent page visible.

The sums were duly paid into Glyn's
sion of the lands delivered up; and on 1
1847, an abstract was delivered of the set
the 19th of April of the fee simple lands
April, Thomas Lewis died without issue
sent plaintiff became tenant for life of th
and the solicitors of Thomas Lewis, dec
solicitors of the plaintiff. The title of th
settled lands having been approved, the
citors engrossed a conveyance, and on 1
1840 sent it to the plaintiff's solicitors

end in the City for the purpose of seeing the money laid in."

On the 26th of May, accordingly, the plaintiff's solicitors attended, and saw the sum of 9,467*l.* 7*s.* 10*d.* paid into the Bank of England, to the name of the Accountant-General, *ex parte* the South Wales Railway Act, that sum being a proportion paid in respect of the settled estates under an award of the 9th of March, 1847. For this sum of 9,467*l.* the Bank gave a receipt; and on the 28th of May, the Company's solicitors informed the plaintiff's solicitors that they had filed such receipt at the Accountant-General's office, and sent a copy of the receipt.

On the 5th of June, 1849, the plaintiff executed the conveyance; but it was never delivered to the defendants. On the 21st of August, 1849, the plaintiff's solicitors sent the Company a statement as to interest and costs up to that date, in which were included all the costs of the conveyance, interest up to the 26th of May, the day of payment into the Bank, and a further amount of interest, left blank, to be calculated up to the completion of the contract. This statement was mislaid; and in January, 1851, steps having been taken in the interval, the Company's solicitors requested the plaintiff's solicitors to furnish them with a statement of the interest claimed in respect of the land purchase and compensation monies.

On the 7th of February, 1851, the plaintiff's solicitors accordingly sent a fresh statement, in which interest was claimed upon all the above-mentioned sums, at 5*l.* per cent., from the date of such statement, viz. the 7th of February, 1851. This claim the defendants disputed, alleging that, under the agreements of the 1st of July, 1845, and

6th of April, 1847, and the Lands Clauses Consolidation Act, interest ceased to be payable after the 26th of May, 1849, the time of payment into Court of the purchase and compensation monies in respect of the settled estates. No part of the 9,467*l.* 7*s.* 10*d.* had ever been invested,

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the parties from the bank of Messrs Olym
ment which did not affect the existing con
the plaintiff was to receive interest as an
possession of the land, until he received th
money; that the completion of the purch
the execution and delivery of the convey
not yet been completed; that the vendor
applied to the Court for investment of it
until the conveyances had been execute
there had been no laches or delay on his p
the present within the case of *Dé Visme*

—They cited also *Ex parte Lord Hardwi*
... Mr. Rolfe and Mr. G. J. Russell, who
tended that, under the 69th and 71st sect
Clauses Consolidation Act, 1845, the New
Railway Company, must take the initiati
vestment of monies deposited in Court, t
struction of the agreement would have
pletion of the purchase," to mean that
the money to the vendor, but the Act, of
that, in the case of settled lands, the mon
into Court, and not to the person, subje
to contract for the sale. The payment

be construed to mean that the Company were to pay consideration money, and also interest on that very money; that interest would naturally cease so soon as the company had parted with the purchase money.

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THE SOUTH
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W. P. Wood, in reply, contended that the money in case was paid under the agreement, and not under the 1845 Clauses Consolidation Act; that the sale was pecuniary and the money payable in respect of the withdrawal of the land, as well as of the land sold; that "completion" at least mean, that before conveyance all purchase money and interest should be paid, and that a high rate of interest had been stipulated for, as a penalty to compel the company to complete the contract forthwith; that the company had taken no steps to procure the money in order to be invested, or to induce the plaintiff to apply to Court for that purpose.

JUDGE-CHANCELLOR SIR G. TURNER (after stating the facts):—I am of opinion, that, under the circumstances of the case, interest on the sum of 9,467*l.* 7*s.* 10*d.* ceased to run on the 26th of May, 1849.

Nov. 17th.

The question depends on the construction of the agreement of the 6th of April, 1847, taken in connection with the subsequent conduct of the parties. The original agreement of the 1st of July, 1845, points to different matters, governing the present question. The agreement of the 6th of April, 1847, after some recitals which are not material, contains in the operative part the terms of the contract. [His Honour then read the operative part.] The question is, what is the meaning of the words "until completion of the contract?" Generally, perhaps, they point to the completion of conveyance of the estate, and final conclusion of all matters between the contracting parties. But this is not their only or their necessary meaning.

They may mean the completion on the part of the company.

possession of the land, and payment of the purchase money. Is it reasonable that interest should be paid until a complete conveyance of the money having been paid long before?

Interest is compensation for delay in the principal. An agreement might be so expressed as to require interest payable on the purchase money, but it would require strong evidence to show that it was intended. I think, that are to be found in especially looking at the close connection between the payment of the purchase money and the completion of the contract; and therefore, in my opinion that the completion of the contract is the completion on the part of the purchaser by payment of the purchase money. A different construction would be a hardship, and would, as was observed by the defendants, lead to the conclusion that interest was payable upon the whole purchase money, as well as for the settled lands. The court confirms my view, for interest was allowed up to the 26th of May, 1849.

If this construction which I have put on it be not the true one, it would be difficult to get this case out of the doctrine in *De Vries*

was argued that the agreement was one whole agreement; and that, as to part of the lands included in the act, the title is not yet made out; but, in addition to what I have already stated, I think the agreement must be construed severally.

Great reliance was placed upon the case of *In re The Linn and Royston Railway Company, Ex parte The Earl of Hardwicke* (a); but that case does not, I think, apply. It was decided by the Lords Justices, on the special application, that after the payment into Court had been made, a notice was written by the vendor, giving notice that interest would be claimed. Here there is no such circumstance; but, on the contrary, the Company were, perhaps, induced to a contrary conclusion by the letter and calculation of interest up to the 26th of May. I think, therefore, my answer to the question submitted to me must be, that interest is not payable by the purchasers after the payment into Court; but as there has been great delay in the payment of the purchase money by the Company, I shall not award any costs.

(a) Preceding case.

1852.
LEWIS
v.
THE SOUTH
WALES
RAILWAY CO.

1850.

BEFORE THE MASTER OF THE ROLLS.

MAY 1st &
2nd.DUMVILE v. THE BIRKENHEAD, LANCASHIRE, AND CHE-
SHIRE JUNCTION RAILWAY COMPANY (a).

A BILL was
brought by a
shareholder in
a Railway
Company, on
behalf of him-
self and all
other share-
holders, ex-
cept the de-
fendants, the
directors, to
restrain the
directors from
raising money
by calls or
loans for the
carrying on
works with a
view to the
completion of
a part only of
the line.
There were
several clauses
of shareholders
in the
Company,
some of whom
assented to,
and others
dissenting
from the par-
tial comple-
tion of the
line. To this
bill the direc-
tors demurred
for want of

THE bill in this cause was filed in the month of Fe-
bruary, 1850, by W. P. Dumville, the owner of forty 34
shares in the above Company, on behalf of himself and all
other the shareholders or proprietors of shares in the same
Company, except the defendants, against the Company and
the directors thereof (nominatim). The facts, as stated in
the bill, were as follow:—

In 1837, the Chester and Birkenhead Railway Company
were incorporated by an Act (1 Vict. c. cxvii.) for the pur-
pose of making a railway from Birkenhead to Chester.

In 1846, an Act (9 & 10 Vict. c. xci.) was passed for
making a railway from the Chester and Birkenhead Rail-
way to the Manchester and Birmingham Railway with
branches therefrom: and thereby, after reciting that the
making of the said railway with branches would be of
great public advantage, and after incorporating with the
special Act the three General Clauses Consolidation Act,
1845, it was enacted, among other things, that the capital
of the Company should be 1,500,000*l.*, that the number of
shares should be 45,000, and the amount of each share
should be 33*l.* 6*s.* 8*d.*; and by the 8th section it was
enacted as follows, viz. "That it shall be lawful for the

equity and for want of parties:—*Held*, that the partial completion of the line was not within
the powers of the Company; and

That the plaintiff could properly file a bill, on behalf of himself and of all other share-
holders, to stay illegal proceedings by the directors; and that the several clauses need not
to be separately represented. Demurrers overruled.

(a, See the next case.

Company to borrow, on mortgage or bond, any sums not exceeding in the whole 500,000*l.*, but no part of such sum shall be borrowed until the whole of the said capital of 1,500,000*l.* shall have been subscribed for, and one-half thereof shall have actually been paid up."

By another Act passed in 1847 (10 & 11 Vict. c. cxxxix), the Chester and Birkenhead Railway was incorporated with the Birkenhead, Lancashire, and Cheshire Junction Railway, and thereby the several undertakings of the former Company, as well as those which had been commenced as those which had not been commenced or completed, and all the lands, monies, &c. (subject to the existing debts, liabilities, contracts, &c. of the Company) were vested in the latter Company.

By the 13th section it was enacted, that every proprietor of shares in the capital of the Chester and Birkenhead Railway Company, of the nominal value of 50*l.* each, should be entitled, in respect of each such share, to two shares in the incorporated Company, of the nominal value of 27*l.* 10*s.*; and that the proprietors of shares of 20*l.* each should be entitled to the like number of shares in the incorporated Company of the nominal value of 22*l.* each.

By the 14th section, the shares of 27*l.* 10*s.* were declared to be fully paid up and satisfied; but as to the calls on the shares of 22*l.*, which should have been made and were not paid, the directors were to have such remedies for obtaining and enforcing payment as were provided by the Companies Clauses Consolidation Act, in respect of money subscribed towards the undertaking of the incorporated Company.

By the 20th section, the shares in the Birkenhead Junction Railway Company of the value of 33*l.* 6*s.* 8*d.* were reduced to 31*l.* and, by the 21st section, the proprietors of 27*l.* 10*s.* and 22*l.* shares were to share the profits *par-passu* with the holders of the shares of 31*l.* each in proportion to the amount paid up by such proprietors respectively.

On the 1st of January, 1847, the directors of the

1850.

DUMVILE

v.

THE

BIRKENHEAD,
LANCASHIRE,
& CHESHIRE
JUNCTION
RAILWAY CO.
v. THE

A Bill was
introduced
into the
House of
Commons
on the 1st
of January
1850, for
the purpose
of enabling
the directors
of the
Birkenhead,
Lancashire,
& Cheshire
Junction
Railway
Company
to make
calls on the
shares of 22*l.*
which had
not been
paid up, and
to have
such remedies
for obtaining
and enforcing
payment as
were provided
by the
Companies
Clauses
Consolidation
Act, in respect
of money
subscribed
towards the
undertaking
of the
Company.

the Company, finding it impossible to raise money necessary for completing the entire lines, procured all their lines except that from Chester and to apply to Parliament for powers. On the 25th of the same month a special shareholders was duly convened and a resolution was passed that was put and resolved by the shareholders.

The directors then made a call of 10% the next session of Parliament brought in the bill for the amendment of all the lines except to Lower Walton.

Before the introduction of the bill in Committee the directors agreed with the Committee that the works on that portion of the line from Chester to Lower Walton, and other works.

When the bill was in committee, clause inserted which rendered it inexpedient to pass and by a resolution of the shareholders, a meeting was convened for that purpose, the further the bill in Parliament was resolved to be.

The directors then made two several resolutions which were passed by the shareholders.

a bill alleged, that the purposes for which those calls made were illegal; that the directors had no powers complete only a portion of their line, or to enforce calls at purpose only.

a bill charged, among other things, that the shareholders were very numerous, and alleged, "That, upon the 1st of January, 1850, all the proprietors of all classes of shares in the Company became entitled to share the profits of the Company equally in the proportions of the amounts actually paid up on their shares; and accordingly the proprietors of the shares of 27*l.* 10*s.* each had no interest in making any further calls to be made or paid up on the 31*l.* shares and 22*l.* shares respectively, except for the sole purpose of such further calls being applied in making constructing the whole of the said lines and works of the Company, as authorised by Parliament, which was not done; and that even if the proprietors of the shares of 10*s.* each had (which they had not) any separate or distinct interest in having such further calls made and paid they and their interests in that respect were sufficiently represented in this suit by the defendants, the directors, who were respectively holders and proprietors of some of the shares of 27*l.* 10*s.* each in the said Company; that the validity of the aforesaid determination of the said Company, and of the said directors thereof, to abandon the construction of the parliamentary lines and works, and to make a railway from Chester to Walton-bridge only, and to do at purpose the other acts herein mentioned, was of a nature which affected in common the interests of the plaintiff and all other the proprietors of shares in the said Company; and that the determination of the directors was not capable of being lawfully executed by the Company, or authorised or sanctioned by the proprietors of shares in the Company; and that the plaintiff had always dissented from, and had never concurred in, the aforesaid illegal proceedings of the defendants."

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DUNVILLE

THE

BIRMINGHAM

LANSHIRE

& CHESHIRE

JUNCTION

RAILWAY CO

and save harmless the Company and the fund all the consequences of those illegal acts and the directors.

The bill then prayed an injunction, namely, the injunction moved for in the next case.

To this bill the Company demurred, for want of parties.

Mr. Roupell and Mr. Glasse, in support of cited *Bailey v. The Birkenhead &c. Company (a)*.

Mr. Turner and Mr. Cole contra, cited *Eastern Counties Railway Company (b)*, & *The Grand Collier Dock Company (c)*.

Mr. Roupell replied.

THE MASTER OF THE ROLLS.—In cases it is very far from the disposition of the Court of this kind, unless justice requires protect the interests of each class. The which suits of this kind are sustained at all, ingly great, and the powers entrusted to the d

old I have, I am sure, that these objections to any of them ought to be sustained. The only effect would be that the board would be empowered to do as they pleased and it would be no longer necessary to refer to the directors. It is a very important question, and it would be very far from desirable to give to any body, though it would be a great addition to the powers of the directors, the power to do as they pleased. I am sure that the directors must apply to the Legislature for additional powers, if they require them, unless the Lord Chancellor or the House of Lords should, on appeal, otherwise decide the case. In this Court I cannot, after the decisions already made here and elsewhere on the subject, arrive at any other conclusion. If these decisions be not known amongst persons engaged in railway matters (which I can hardly suppose to be the case), the sooner they are informed of them the better, because they put themselves to great expense in striving against a rule of law, which they must either procure to be altered, or submit to.

Now, the object of this bill is to restrain an act which this Court has determined to be illegal, and to call on the directors under whose management that act has been done, to indemnify those who are likely to suffer by it. Is it necessary to have that distribution of parties which is contended for? Is it not rather to be said, that, even if a party has voluntarily taken a part in doing an illegal act, he may be heard on an application to this Court to put an end to it, and to have an indemnity? I ought not to be particularly minute as to the distribution of parties under such cir-

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1. The first part of the document is a list of names and titles, including "The Hon. Mr. Justice" and "The Hon. Mr. Justice".

MASTER C
AND
LORD CH

GRAHAM v. THE BIRKENHEAD, LANC
CHESHIRE JUNCTION RAILWAY C

THE bill in this cause was filed on the 4 by J. Graham, on behalf of himself and all holders or proprietors of shares in the above company and the several directors thereof, against the directors of the Company, to restrain the

1850
 GRAHAM
 &
 THE
 BIRKENHEAD,
 LANCASHIRE,
 & CHESTER
 JUNCTION
 RAILWAY CO.

Defendants might be restrained by injunction from making, or continuing to make, a certain proposed railway from Chester to Lower Walton only, and from applying any part of the capital or funds of such Company in or towards the construction or completion of the said railway from Chester to Lower Walton only, or otherwise than for the purpose of making and completing the entirety of certain lines in the said bill mentioned, in pursuance of the powers vested in them by the special Acts of the Company, or which might hereafter become vested in them by Act of Parliament; and that they might be restrained from borrowing the sum of 200,000*l.*, or any part thereof, or executing any mortgages or debentures under the common seal of the Company in respect thereof, except for the purpose of paying off loans already made; and also from making any further call or calls, or enforcing by forfeiture or otherwise the payment of the several calls of 2*l.* and 3*l.* in the bill mentioned, or either of them, upon or by the shareholders of the said Company or any of them, with the view to apply the proceeds of such calls or any of them, or such monies or any part thereof respectively, in or towards the construction or completion of the proposed railway from Chester to Lower Walton only, or otherwise than for the purpose authorised by the special Acts of the Company (a).

(1.) [The bill in this case was founded on the same facts as those stated in the preceding case of *Dumville v. The Birkenhead, &c. Railway Company* (b).]

(2.) The present bill charged, that certain calls of 10*l.*, 3*l.*, and 2*l.*, were made for the purpose of completing that part of the line only which ran between Chester and Lower Walton, and that such an application of the funds of the Company was illegal, and that the plaintiff had paid up all calls except the last call of 3*l.* per share. The plaintiffs now moved for an injunction and declaration in the terms of the prayer of the bill.

(a) 7 Will. 4 & 1 Vict. c. cvii.; 9 & 10 Vict. c. xci.; 10 & 11 Vict. c. ccxxii.

(b) Ante, p. 932.

1880.

GRAN

THE

BY THE COURT
IN THE
CHANCERY
OF THE
STATE OF NEW YORK
IN SENATE

affidavits were filed on both sides. It appeared from the affidavits filed on behalf of the defendants, that the sum paid in the prosecution of the works up to the 31st of December, 1849, amounted to 293,445l.; and the sums for which the defendants were then liable amounted to 30,967l. for works done, and the sum of 269,970l. for works not done for and in course of completion. It appeared also that the case made by the affidavits was the acquiescence of the plaintiff in this great expenditure up to the date of the filing of the bill, although it had been proposed and determined at a special meeting of the shareholders, held on the 28th of November, 1848, that, under the then existing circumstances, it was impossible to complete the entire railroad railway, and a bill had been introduced into the House in order to procure the sanction of Parliament to the abandonment of the several lines of railways, except the part between Chester and Lower Walton (1).

Mr. R. Palmer, and Mr. Cole, in support of the motion, cited *Cohen v. Wilkinson* (b), *Att-Gen. v. The Corporation of Poole* (c), *Frewin v. Lewis* (d), and *Squire v. Campbell* (e).

The arguments of Mr. Fowler and Mr. Stacey, for the Company, were referred to and commented on in the judgment of the Master of the Rolls (f).

Mr. Roupell and Mr. Willcock for the directors, contended, that there was a misjoinder of plaintiffs, inasmuch as there were two classes of shareholders; the one class who were desirous of having the line to Lower Walton only completed; and the other class, who wished to prevent the formation of any line at all: *Richardson v. Larpen* (g), *Evans v. Stokes* (h), *Mozley v. Alston* (i); and that the proceedings

(a) *The Bill v. The Directors* abandoned. 66 L. J. 3. 1880 (v)
(b) Ante, Vol. 4, p. 141 (A)
(c) 4 My. & Cr. 177 (1842)
(d) Id. 249; 9 Sim. 66.

(e) 1 My. & Cr. 139 (1841)
(f) 2 Y. & C. 62 (1841)
(g) 1 Keen, 24 (1841)
(h) Ante, Vol. 4, p. 141 (A)
(i) 1 My. & Cr. 139 (1841)

... the construction of these railways
selves. It is, therefore, impossible to
like a satisfactory conclusion on the po
case, unless we have regard to the p
partnerships—to the public duties whi
have undertaken, and to the parliament
which they have subjected themselves.

I consider it to be now clearly establis
that Railway Companies, constituted by A
have a condition imposed on them to fi
Act contemplated; and if they have un
plete a line or any series of lines, they s
to complete the whole of that line or serie
not, without parliamentary authority, (v
competent authority for that purpose,) a
don any portion of their undertaking.
conditions that the Legislature has giv
panies such extraordinary and despotic po
vate property of individuals. It is upon
whole works contemplated by Parliament
and that they are likely to produce a pu
extent so great as to compensate for the i
vate rights of individuals having property
these extraordinary powers are given.

1856.
CHAMBERLAIN
THE
DIRECTOR,
LONDON,
CHAMBERLAIN
SONS & CO.

great public duties which the Companies have undertaken. However erroneous this notion may be, I cannot attach any serious blame to the persons who have acted in that manner in recent times. It is very probable that they have been indiscreetly drawn into these mistakes by the zeal with which they have prosecuted the particular interest of those depending on them, and from not being sufficiently informed of the obligations by which they were bound. I am very far from attaching any great blame to this Company, but, at the same time, I must bear in mind that this is no new law now introduced for the first time, but the application of a law well understood; and, besides, no principle is more familiar to us than this, that ignorance of the law can never excuse its violation.

This principle, then, being so well established, cannot, as I conceive, be deviated from except by authority of Parliament, or by a contrary decision in the House of Lords, and until this takes place, it must be acted on as law here; neither do I think that this Court can exercise any arbitrary discretion as to its enforcement. In this case it clearly appears that power was given to make the whole line to Stockport, and a branch line from Hooton to Helsby. That was the object which Parliament had in view, whether on a notion of encouraging competition or any other notion (with which we have nothing to do), beyond all question it was the object of Parliament, that the whole of that line and its branches should be completed, and it was upon the faith that that would be done, that the powers were given to the Company by their Acts.

It is now proposed to do certain things, but not with a view of completing the whole line. I give credit to the Company for having on this occasion frankly and fairly stated what is the present state of things, and for this they are entitled to every favourable consideration that can be given to them; but it must now be necessarily admitted,

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THE

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& CHESHIRE
JUNCTION
RAILWAY CO.

that they do not intend, and indeed are not able at the time, to complete the parliamentary contract. They are unable to perform the conditions in respect of which the powers were granted, and they desire that they should not be restrained from proceeding to do part only of that whole which they have undertaken and are under an obligation to complete. This, as I conceive, comes directly within the principles established in the former case. The defendants are not to do a part only, although, without the completion of that part, the whole could not be made. They have a right to do the part, in contemplation and with the intention of completing the whole; but they have not a right to do that which, in truth, is a substitution of something new, and something different from that which was intended by the parliamentary contract.

It has been very ingeniously and very ably argued that this is not like the former cases; for it is said, that they are doing a part of that which must form a portion of the whole. So, also, was going from Epsom to Leatherhead (a) a part of the way from Epsom to Portsmouth; and I cannot see any distinction between these two cases. But then it is said, that, in the present case, contracts have been entered into with the intention of completing the whole line. I cannot see how that can make any material difference in this matter. On the 1st of January, 1847, and at a time when there was a prospect of completing the whole line, the contract was entered into with Mr. Brassey, and works were commenced with a view of performing that contract and of commencing the whole line in the month of March following, which was before the Amalgamation Act passed (b). Those works were afterwards suspended for a considerable time. Because the defendants have entered into those contracts with Mr. Brassey, and

(a) *Salomons v. Laing*, ante, Vol. 6, p. 289.

(b) 10 & 11 Vict. c. cxxii. 22nd July, 1847.

have thereby incurred very onerous obligations is their inability to perform the contract into which they have entered with him, a reason why they are to be allowed to depart at all from the conditions which the Act of Parliament has imposed on them? It may be extremely unfortunate for them, that at a time when they intended to do what was perfectly right, and to act within those conditions, they should have entered into a contract, and while that contract was in process of execution, have found themselves in such a situation that they could not perform their part of it; but is that a reason why the Act of Parliament should be departed from? Is the circumstance that they are accidentally unable to perform their obligations to Mr. Brassey a reason for enlarging the powers given by the Act of Parliament? I confess I do not see how that can be so, and although it has been urged with great ingenuity and ability, I do not think that it has been wholly out of my power to succeed in an argument of this nature, that the conditions of the Act of Parliament are to be violated, because, with the intention of adhering to them, the Company have entered into a contract which they are as much unable to perform as they are to comply with the conditions of the Act of Parliament. I consider that this is no excuse for not fulfilling the enactments of an Act of Parliament, which others and every one else are bound to take notice of and to observe. Then it is said that this case differs from others, by reason of the nature of the combination and contract existing between the Birkenhead and Chester Companies and the other parties. The proprietors of the Chester Company are merged in the general proprietors of the whole line; but they were contracting parties for a purpose sanctioned by Act of Parliament, which imposed on them all the obligations of that Act, and among them that of completing the whole line. I conceive, therefore, that this makes no difference at all, and that they are subject to the application of the same principle which has been recognised in the

NOTE.

GRANAM

THE

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LIVERPOOL,
AND CHESTER
RAILWAY CO.

1851.
 GRAHAM
 v.
 THE
 BIRKENSHEAD,
 LANCASHIRE,
 & CHESHIRE
 JUNCTION
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cases referred to. This, therefore, is no reason why the authority of the Court should not be applied in the present as in the other cases, to prevent the construction of a new line, and the substitution by private authority of a new contract, of a new condition, and, in truth, of something quite different from that which the Company are authorised by their Act of Parliament to construct.

The representations which have been made as to the very great and disastrous loss which must be incurred if these works should now be suddenly stopped, have given me great anxiety. It is true that counsel have not gone so far as to argue, that, on this account, the conditions of an Act of Parliament are to be violated; but still the great loss which will ensue has been considerably dwelt upon in this way, that it is intended (I presume by application to the Legislature, for that is the only intention I know of) to create an authority, by which, with due attention to the public interest, a deviation from the original plan may be allowed; in fact, that there is now a proposition before Parliament—which undoubtedly possesses the power—to allow a departure from the conditions imposed by Parliament, so as to enable parties to abandon a portion of these works which, under the conditions of a previous enactment, and in return for the powers granted, they were bound to complete in entirety. In point of principle, it seems to me very difficult to see how this argument can be applied. This and every other Court must administer the law in the state in which they find it when they are called on to administer it. There can be no doubt of this.

Then it is said, that the jurisdiction by injunction is additional, and superadded to the legal remedy; and that the exercise of it is discretionary in the Court. It is so; but this jurisdiction is applied according to general rules; and this Court must not go to the extravagant length of saying. We have a discretion and we will not give the persons applying for the injunction the benefit of the law as it now stands.

because we anticipate that the Legislature, seeing that the application of the law is likely to produce extensive loss, will alter it.

Having on different occasions seen the great hardship to which parties may be exposed by an injunction, and, on the other hand, knowing that there are cases in which an additional expenditure of some amount, without carrying on new works, might tend to give the public the benefit of the works, so far as they have been completed, and, at the same time, render them profitable to the shareholders, and perhaps prevent the whole from being an absolute loss, I have at least endeavoured to persuade myself that the Court might exercise a discretion in such cases. I am far from sure that I have been right in that respect. The report of a case which I have already decided has been read to me, which, I believe, is perfectly correct, *Hodgson v. Earl Powis* (a); but, since that, two cases have occurred, in both of which I have not exercised a discretion, although I might possibly have done so. In one case, the Company had carried the line to a certain extent, and all they wanted, in order to make it useful, was the erection of a station; and the question was, whether it would be possible to allow the expense of a station. It seemed to me to be a case in which, without any great mischief to the shareholders or anybody else, the Court might do it, and I was anxious to make the attempt; and I dare say everything was done by the parties to bring before me a case on which, if I thought the discretion could have been exercised, I should have exercised it; but it failed. The other was a case respecting the payment of dividends already declared. It seemed to me very hard to stop the payment of income to parties when there were funds in hand, said to be properly applicable to their payment (b). The parties endeavoured there to make out

(a) Next case

(b) *Carlisle v. The South Eastern Railway Company*, ante, Vol. 6, p. 570

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1860.
GRANHAM
THE
BIRKENHEAD,
LANCASHIRE,
& CHESHIRE
JUNCTION
RAILWAY CO.

1880.

CHAMBER

IN

THE

BIRMINGHAM,
LONDON & GLOUCESTER
JUNCTION
RAILWAY CO.

such a case as would justify me in permitting the application of the fund; but they failed in persuading me to do so. It is satisfactory to me to find, that, on another point not brought before me, that injury to individuals which anticipated, was afterwards prevented by the Lord Chancellor.

Whether such a discretion does exist or not, I think must grant an injunction in this case. I do not, however, mean to repudiate that discretion, if a case should arise which the Court might not be disposed to act in a very and strict manner: I mean a case in which by a small expenditure a great benefit might result to the shareholders and a considerable advantage to the public.

It is not without considerable pain that I feel myself bound to come to the conclusion at which I have arrived in this case. I think that the defendants ought to be restrained from going on with these works, because they are progressing with a view to the completion of the whole line and my opinion is, that the circumstance that this order is very likely to be productive of considerable loss, does not justify me in exercising any discretion as to refusing application for an injunction.

With respect to the loan, if there are legal and proper purposes for which some loan may be raised, I am not disposed to grant the injunction in the terms asked; but I think it would be reasonable to grant it to the extent of restraining the defendants from raising money for any purpose other than that of paying off loans already made. I think this may be right, because from the manner in which the defendants have proceeded, there are indications that the money is intended for general purposes.

As to calls and deposits, I am satisfied that the calls are legal. Calls may be required for the payment of liabilities.

undischarged in consequence of the calls not having been paid. If so it would not be right to grant an injunction in terms which would preclude the directors from enforcing in any legal mode the payment of calls which may be required for legitimate purposes. The difficulty is in framing the order *a*. If words can be introduced modifying the order so as to leave them at liberty to enforce calls for the payment of all legitimate purposes, I am disposed to grant the injunction to that extent. I should be sorry, while preventing the part performance of works which ought to be completed in entirety, to prevent the enforcement of those calls on the shareholders which they ought to meet in discharge of just claims *a*.

From this judgment the defendants appealed, and a motion to discharge or vary the order of the Master of the Rolls came on to be heard before the Lord Chancellor *b*.

(a) The order, as drawn up, was in the following form:—

"That an injunction be awarded to restrain the said defendants, the Birkenhead, &c. Company and the defendants (nominating) the directors thereof, from making or continuing to make the proposed Railway in the plaintiff's bill mentioned from Chester to Lower Walton only, and from applying any part of the capital or funds of

and works of the said Company, in pursuance of the powers vested in them by the special Acts of the Company, or which may hereafter become vested in them by Act of Parliament; and also from borrowing the sum of 20,000*l.* or any part thereof, or any other sum, or executing any mortgages and debentures with the common seal of the said Company, except for the purpose of paying off loans already made

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GRAMAN
v.
THE
BIRKENHEAD,
LANCASHIRE,
& CHESSING
JUNCTION
RAILWAY CO.

1880.

GRANHAM

v.

THE
BIRKENHEAD,
LANCASHIRE,
& CHESHIRE
JUNCTION
RAILWAY CO.*Mr. Bethell, Mr. Roupell, as
the appeal motion.**Mr. R. Palmer, and Mr. Co*

The LORD CHANCELLOR.—I
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 cases referred to is one, to whic
 and I do not see any ground
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 are of opinion that it would be
 it to another, they must assent
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 or towards the construction or
 completion of the said proposed
 Railway from Chester to Lower
 Walton only, or any otherwise
 than for the purposes authorised
 by their said special Acts" [until
 answer or further order]. "But
 the said injunction not to ex-

state of the Company in which he had embarked, must have been aware that the whole scheme could not be carried into effect. This was distinctly known in November, 1848, and, so soon as it was known, the question arose, whether the party who subscribed his money—and for this purpose it is immaterial whether they have paid their calls or not—did or did not acquiesce in its being applied in carrying on the works so far as the money would go. Now it appears that a considerable period of time has elapsed since that knowledge came to the plaintiff, and to every one of the parties represented by him in this suit. From November, 1848, down to the date of the filing of the bill, the Company, knowing they could not go on with the whole works, proceed to carry them on to a certain extent, lay out large sums of money, and of course come under liabilities in so doing. Was it not the duty of those who meant to dispute this course of proceeding at that time to make an application to this Court to prevent it? It seems to me, that any member who knew that the Company intended in the then state of their finances to go on with the works as far as they could, and did not make such an application, thereby gave rise to a new equity against himself, which deprived him of the right to prevent the Company from doing that which was contrary to the general rights of the shareholders.

It is said, however, that there was a bill filed by a Mr. Dumville, but that suit was compromised, and can in no way affect the question (a).

This case differs from any which has come before me, for in *Cohen v. Wilkinson* (b), which has been referred to, that sort of acquiescence which is found in the present case did not exist.

Mr. Bethell.—If your Lordship will forgive me for interposing, in *Cohen v. Wilkinson* your Lordship expressed

(a) Preceding case.

(b) Ante, Vol. 4, p. 60.

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the very same view as that which you are now taking. The statement in one Report is (a), "His Lordship concluded by observing, that the only part of the case about which he entertained any doubt, was the allegation at the bar, though nowhere apparent in the bill, that the plaintiff had been aware of and had acquiesced in the substituted undertaking. The plaintiff's counsel then stated, that this was the first time that such an allegation had been made, and that it was entirely unfounded. The Lord Chancellor thereupon ordered the appeal motion to be dismissed with costs." And in another report of the same case (b), your Lordship is reported to have said, on the same point,—“As there is no evidence of such alleged acquiescence, I must discharge the appeal motion with costs.”

THE LORD CHANCELLOR.—That would be the equity between the parties, because, if those who have the management of the affairs of others depart from the regular course and there is an acquiescence, the parties interested who have so acquiesced cannot afterwards complain. This creates the difficulty on the part of the plaintiff in the present case, by his associating with himself the whole body of shareholders; for, at all events, it is an answer to those on whose behalf the plaintiff sues, and it appears to me that the plaintiff himself has not removed the bar to the interference of the Court, which arises from his own acquiescence. He knew what was intended in the year 1848, and again when the Company endeavoured to get the authority of Parliament to carry into effect a part of their plan. It was their wish and intention to get the authority of Parliament, but having failed to obtain it, they went on with the works—thereby announcing to all concerned, that, although they had not the sanction of Parliament, they should proceed with their works, trusting to the acquiescence or the

(a) 1 Mac. & G. 487.

(b) Ante, Vol. 4, p. 761.

approbation of those who were interested in making use of the property which they had acquired.

A great deal of care and discretion is always required in exercising the jurisdiction of the Court in cases of this sort, where questions arise with reference to injunctions. The object is to protect the interests of the parties; and whatever their situation may be, the Court will be very cautious in exercising its jurisdiction, if it sees clearly that its interference, instead of protecting their interests, will tend to the ruin of the great body of those concerned.

Seeing that the works in the present instance have proceeded for some time past—seeing that a large expenditure has been made—considering how near the works are to completion, and the comparatively small sum that will be required to complete them, how can it be supposed that anybody having a legitimate interest in the ultimate realisation of profits from the works could derive any benefit from the injunction which has been granted? If the injunction is continued, the result must be, not only the loss of the money already expended, but of the whole property; there will be an end of the concern, and every shareholder will lose the whole of his money. That is a consequence which the Court would be sorry should result from any order it might make; and I do not feel disposed to administer an equity, from which it is probable that such a consequence would ensue.

On the other hand, there is danger in permitting money to be laid out in a manner not originally contemplated by an Act of Parliament. The question then is, whether those parties who are now complaining and suing in respect of their interest in this money have by their conduct precluded themselves from coming to a Court of Equity to keep the Company strictly to that which they were originally bound to do under their Act.

Assuming that in the present case the parties knew—as they must have known—what the course of proceeding

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was, I consider that, by not coming sooner, they have precluded themselves from the exercise of the extraordinary jurisdiction of this Court; and on that ground, although it may be a matter of great delicacy in other cases, I must in the case before me refuse to interfere by injunction.

From the facts now before me, I find that knowledge as to what must be the result, was, if not possessed by the plaintiff, at all events accessible to him. The failure of the original plan not arising from accident or from any other cause which could be remedied, but from the state of the money market, whereby the finances of the Company were placed in a position which rendered it hopeless that the whole scheme would be carried into effect, I must say, it was the duty of the plaintiff, as soon as there was a manifestation of an intention on the part of the Company to carry on the works, which must of necessity be of less extent than those originally contemplated, to have inquired into the matter, and, if necessary, then to have applied and obtained the decision of a Court of Equity on the subject.

It has not been suggested, what possible return there could be for the expenditure already made, if the works are now stopped. The sum which has been expended is a frightful amount under any circumstances; but if that expenditure is to end in nothing, if the works are never to be completed, ruin may be entailed on a great many persons without the possibility of good to any one.

This also must enter into the consideration of the subject viz. that the plaintiff and those on whose behalf he files the bill, or some of them, are defaulters, by not having paid up their calls. It is possible that their default alone may not have caused the impossibility of carrying on the works to their full extent: but at all events, a large sum is due from them, which creates, or tends to create, the difficulty which is supposed to give rise to the jurisdiction of this Court.

Therefore, without feeling at all confident that the Master of the Rolls is not right in the conclusion to which he

has come, I am bound to exercise the best discretion I can in reviewing his opinion; and I consider that, upon the ground of acquiescence, the injunction granted acts too stringently on an admitted principle;—that principle no doubt ought to be acted on in cases to which it is properly applicable, but it must be relaxed and confined within certain limits as the rights of the parties require. I decide nothing; but I think the circumstances of the case are such as to preclude the plaintiff from calling for the interposition of this Court, and that, therefore, the injunction must be dissolved.

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Mr. *R. Palmer* then directed his Lordship's attention to that part of the injunction which applied to the loan of 200,000*l.*

Mr. *Bethell* submitted that the injunction was unnecessary, inasmuch as the 40th section of the Railways Clauses Consolidation Act enacted, that, until the payment up of half the capital was certified by the certificate of a justice of the peace, nothing could be borrowed on bond or mortgage.

The LORD CHANCELLOR.—They have not borrowed the money, and they say they do not want to borrow it; if they manifest an intention at any time of so doing, I might then, on the ground that one half the capital is not paid up as the Acts require, grant an injunction. As the Company have already borrowed more than the Acts authorise them to borrow, I think that that part of the injunction can do no harm. The order will be to continue the injunction as to the 200,000*l.*, and dissolve it as to the rest.

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BEFORE THE MASTER OF THE ROLLS

AND

BEFORE THE LORDS JUSTICES.

Jan. 19th &

22nd;

April 16th.

1851.

Nov. 13th.

By three several Acts of Parliament three distinct lines of Railway were authorised to be made by the same Company, and a specified amount of capital was directed to be raised under each Act; but it was declared that such capital should form the general capital of the Company. By a subsequent Act, the said Company, on completion of the Railways, were bound to grant, and the L. & N. Company to accept, a lease in perpetuity of the three Railways; and, "for the removal of doubts," the Company authorized by several Acts to form the three lines of Railway was declared to be one Company. Some determined to abandon two out of the three lines, and were enforcing calls to complete the third, when the plaintiff filed his bill, praying an injunction to restrain completion of one line only, and from enforcing calls for that purpose. To this bill the defendants demurred for want of equity, and for want of parties.

The Master of the Rolls expressed his opinion in favour of the bill, but ultimately denied the demurrer, on the ground that the bill contained no allegation that the defendants refused to apply the funds of the Company to the construction of the one line on which they were bound to embark.

The plaintiff amended accordingly, and applied for an injunction, which the Master of the Rolls granted.

The Lords Justices dissolved the injunction: the Lord Justice Knight Bruce, on the grounds, that, the Railway being in actual operation, the terms of the injunction were too stringent, that the L. & N. Company ought to be parties to the bill, and that the plaintiff had acquiesced in the expenditure, and the Lord Justice Lord Cranworth, on the ground that, though the three lines formed, in his opinion, one undertaking, which the Company were bound to complete, the Court would rightly exercise its discretion as to granting an injunction on an interlocutory application, in the present case, by discharging the order.

HODGSON v. EARL POWIS and Others.

THIS was a bill filed by Thomas Hodgson, a holder of new 20l. shares in the Shropshire Union Railway and Canal Company, against the Company and the Earl of Powis, [nomination], of whom the defendant was chairman, praying that it might be declared that it was not within the powers of the Shropshire Union Railway and Canal Company or the directors thereof, to apply any of the moneys which were authorised to be raised under the provisions of the Acts of Parliament of 1846, thereinafter stated and hereinafter mentioned, or any of them, for the purpose only of constructing a railway from Shrewsbury to Stafford, and the works authorised to be constructed thereon, and that the powers and provisions of the Shropshire Union Railway and Canal (Shrewsbury and Stafford Railway) Act of 1846; and that the said Company and the directors thereof might respectively be restrained from applying the moneys which had been paid by the holders of shares except for the purpose of, and with the view to, the construction of the whole of the railways and works

ed to be constructed under the powers and provisions of the said several Acts of 1846. And that the Company and directors might also be restrained from making any further or other calls upon the new 20*l.* shares in the said Company, except for the purposes therein aforesaid; and from enforcing the payment thereof, or of any calls which had been made upon the said new 20*l.* shares under the provisions of the Acts relating to the said Company, or from declaring any such shares to be forfeited for non-payment of calls; and also from taking any further proceedings in the action brought against the plaintiff.

The bill stated that three several Acts of Parliament, 9 & 10 Vict. cc. ccxxii., ccxxiii., and ccxxiv. were passed, incorporating the Ellesmere and Chester Canal Company under the name of the "Shropshire Union Railways and Canal Company," for the purpose,—by the first Act, of constructing a railway from the Chester and Crewe branch of the Grand Junction Railway, in the township of Calveley in the county of Chester, to Wolverhampton in the county of Stafford;—by the second Act, for the purpose of constructing a railway from Shrewsbury to Stafford, with branches, "and for the purposes connected therewith;"—and by the third Act, for the purpose of constructing a railway from Newtown to Crewe, with branches therefrom to Ellesmere, Wenn, Whitchurch, and Crewe.

By the first Act the Company were authorised to raise, by new shares of 20*l.* each, 3,000,000*l.*; by the second Act 800,000*l.*; and by the third Act 1,500,000*l.* And it was by each of the several Acts enacted, that the sums so to be raised were to be considered as part of the general capital of the Company; and powers were given to raise certain other sums by mortgage, and to secure the payment thereof upon the several canals and railways comprising the undertaking of the Company, including the railways thereby authorised.

The three general Acts, the Railways, Lands, and Companies Clauses Acts, 1846, were incorporated with the before-mentioned Acts.

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EARL FORTH.

By an Act passed in 1847, completion of their several Railways and Canal Companies required to grant to the London Company, who were empowered lease in perpetuity of the San Canal at a certain rent mentioned removal of all doubts" it was the Shropshire Union Railways and to in the said three Acts (it had been one and the same Company distinct Companies." The line to be managed by a board composed of the North Western Railway and the Shropshire Union Railway.

In the year 1846, the directors 165,000 shares of the nominal value of 21. 2s. per share were made calls on the same and the present plaintiff for the calls on the shares of which

The bill alleged that the amount due by the Company was under the Act of 1847, being the Act authorising the railway from Shrewsbury to Stafford, of the railways authorised by the Act, but that a portion of the line from Shrewsbury to Stafford had been opened for traffic. That the deposits and calls, if made, would amount to 1,072,500*l.*, only authorised to raise by the Shrewsbury and Stafford Act. That in September, 1849, stated the amount of the line undertaken beyond the completion of the Stafford line: and the chairman of the shareholders at a general meeting

resounded that the directors did not propose to construct the Newtown and Crewe or the Chester and Wolverhampton lines, and that they did not intend to carry on any other works than those necessary for completing the line from Shrewsbury to Stafford; and that no new works, in the engineering sense of the word, would be undertaken.

The bill also stated, that the directors had caused an advertisement to be published, to the effect that they intended to apply to Parliament for an Act to authorise the abandonment of the railways and works to be made under the Acts 9 & 10 Vict. c. cxxii. and cxxiv. respectively; and that the directors had in fact abandoned all intention of making the railways from Newtown to Crewe, and from Chester to Wolverhampton.

That, on the 27th of September, 1849, the balance-sheet showed that upwards of 785,000*l.* had been received by the directors on the railway capital account of the Company, and that they had a balance in hand of 109,016*l.* 8*s.* 1*d.*

The bill charged, that the directors could not legally make a railway from Shrewsbury to Stafford only; and that the funds of the Company arising from the exercise of the powers contained in the Acts 9 & 10 Vict. c. cxxii. and cxxiv., could not be legally applied in the formation of a railway under the powers of the 9 & 10 Vict. c. ccxxiii. That the directors had threatened other shareholders besides the plaintiff with actions for non-payment of calls. The bill then prayed as hereinbefore stated.

To this bill the directors of the Company demurred.

The bill did not contain an allegation that the directors intended to apply the funds of the Company in making the Shrewsbury and Stafford Railway only.

The London and North Western Company were not parties to the bill.

Mr. Turner and Mr. Willcock, in support of the demurrer, contended that the capital of the Company, to be raised

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under any one of the Acts, was general, and not applicable to each distinct railway only.

That the directors did not intend to abandon the line from Newtown to Crewe and from Chester to Wolverhampton without the sanction of Parliament ; and that the allegation in the bill, of the directors being about to apply to Parliament, when any objectors to the abandonment could be heard, evidenced the intention on the part of the directors to proceed openly and legally for that purpose. That the default in payment of the calls, and the consequent inability to raise the whole amount, was the cause of a part only of the undertaking being proceeded with ; and that it was not for the plaintiff to come forward to stop the progress of the works, so far as it was possible to complete them, when it was by his own default that the entirety of the works was not now undertaken. That the present was unlike the cases in which the manifest intention was to make part only of a line, inasmuch as the three lines of railway were each distinct, and formed a separate undertaking of itself. That the London and North Western Railway Company were in fact the lessees of the proposed railway under the 10 & 11 Vict. c. cxxi., and had a distinct interest in the subject-matter of the suit, and ought to be parties.—They cited *Foss v. Harbottle* (a).

Mr. *Malins*, Mr. *R. Palmer*, and Mr. *Westoby*, in support of the bill, contended that the bill must be sustained, whichever way the facts stated in the bill were viewed. That if the three railways were distinct, the funds provided for the formation of one could not be applied to the making of the other lines ; and if the three were not distinct lines, but formed one common undertaking, then, on the principle laid down in *Cohen v. Wilkinson* (b), and *Bagshaw v. The Eastern Union Railway Company* (c), the directors could

(a) 2 Hare. 461. (b) Ante. Vol. 5, p. 741. (c) Ante, Vol. 6, p. 152

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not make a portion only of their line with the intention of abandoning the rest. That the London and North Western Railway Company were not shareholders, and therefore not necessary parties, as they did not contribute to the formation of the railway, and could have no interest in it until completed; and that the only effect of the Leasing Act was to compel the defendants to grant, and the North Western Company to accept, a lease of the undertaking when made, but that the last-mentioned Company could not compel the defendants, by any proceedings in equity, to complete their line.

Mr. *Turner*, in reply, relied on the want of an allegation in the bill, that the directors intended to apply the capital in their hands to the formation of one only of the three lines of railway.

The MASTER OF THE ROLLS (after stating the facts as hereinbefore set forth):—I have no doubt that a case of this kind is subject to the application of the same principles as were acted upon in the case of *Cohen v. Wilkinson*, and in the other cases; and consequently, that, as it is here distinctly alleged, these powers, although they at first originated in separate acts of the plaintiff, have become vested in the Company for the purpose of completing the several works which are authorised by all the Acts of Parliament, the directors have no right to apply the funds of the Company to the completion of a part with a view of abandoning the rest, and that is what is alleged over and over again in the bill.

It is not an answer to this case, and I do not think a reason can be drawn for not applying this general principle; because, in the present case, the Act contains powers to apply the capital for certain works, and “for the purposes connected therewith.” That expression is so indistinct in itself, that it must be presumed to mean a portion of the works connected with these Acts, and cannot be applied generally so as to raise a distinction between the present and the decided cases.

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If it be true, as is alleged by the defendants and denied by the plaintiffs, that, although the bill does contain a statement that the directors have abandoned the lines, and that it would be illegal to apply the funds in completing that part of the line only which is not abandoned, does not contain any allegation that it is the intention of the directors to apply the funds of the Company in completing those parts of the line which have not been abandoned. I think a material allegation is wanting, and which probably might have been truly introduced; and therefore, allowing the demurrer on that ground, I must give the plaintiff leave to amend, in order that he may bring the case more fully before me. I will not send him out of Court on that ground, although I think it prevents him from having the relief he now asks. I therefore give him leave to amend, and if he have occasion to amend in other respects he is at liberty to do so.

With regard to the want of parties:—as to the North Western Railway Company, I am very much inclined to think that it would be proper to make them parties, on account of their position with respect to the defendants; I will not, however, decide that point; but the plaintiff must rely upon his own discretion, whether he will make them parties by amendment or not.

I must allow this demurrer, on the ground that the bill does not contain a sufficient allegation that the directors intend to apply any of the funds of the Company in completing a portion of the line, having abandoned the rest.

Demurrer allowed, with liberty to amend generally.

The plaintiff, on the allowance of the demurrer, amended his bill by making three of the holders of new 20*l.* shares in the Company, in respect of which all calls had been paid by the defendants, by striking out of the bill such parts of the Act 10 & 11 Vict. c. cxxi., as referred to the London and North Western Company, and by stating that no portion

the works under 9 & 10 Vict. cc. cccxxii. and cccxxiv. had been commenced; that the powers of the company to purchase land compulsorily had expired by effluxion of time, and had never been exercised; and that the Company had not purchased or agreed for the purchase of any land situate on the abandoned lines of railway.

That the directors had actually received 900,000*l.* by means of calls on the holders of new 20*l.* shares.

“That the directors were now applying, and threatened and intended to apply, the monies now in their hands, &c., and the calls, for the purpose and with a view to the completion of the railway from Shrewsbury to Stafford, and not with a view to the completion of the entire undertaking of the Shropshire Union Railways and Canal Company. And that they intended to make and enforce the payment of further calls, and to apply the monies arising therefrom for the purpose of completing the construction of the line from Shrewsbury to Stafford only.”

The prayer was also amended, by asking that the Company might be restrained from laying out any monies which might thereafter be received by them under the provisions of the three Acts of the 9 & 10 Vict., for the purpose only of completing the railway and works from Shrewsbury to Stafford or otherwise, except with the view, &c.

The plaintiff now moved for an injunction in the terms of the prayer of the bill. *April 15th.*

Affidavits were filed on both sides, the effect of which is stated in the judgment.

Mr. *R. Palmer* and Mr. *Westoby* in support of the motion.

Mr. *Turner* and Mr. *Willcock* contra.

Mr. *Speed* for the Railway Company.

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THE MASTER OF THE ROLLS (without hearing a reply).—Two difficulties have suggested themselves to my mind. The one is, that these shareholders are, in one respect, partners; and the other, that the Company has been invested with very great and extraordinary powers, in return for which they have contracted important obligations to Parliament and to the public. In one respect they are to be treated as partners: but at the same time, the Courts are bound to remember their obligations to the public, and to see that they do not exercise their powers otherwise than for the benefit of the public and the fulfilment of those obligations.

In this particular case, the Railway Company are unable to perform the undertaking which they have entered into with Parliament: the consequence, therefore, is, that they cease to have all those powers which Parliament conferred on them with a view to the complete performance of the whole undertaking. The point has not as yet been distinctly decided, whether the Court has sufficient authority to restrain the rule on any occasion: but what I have done in this case, in another case shows clearly the inclination of my opinion to be, that I have such a power if a proper case arise for the exercise of it.

In applying the jurisdiction of the Court to prevent the application of money in making a part of a public work without any intention of completing the remainder, no difficulty as it arises in a case where the works have not been begun, or where no part of it has been converted to public use. The difficulty arises in a case like this, where the work has been carried on and constructed to such extent as to be capable in part, though imperfectly, answering the purpose which Parliament had in view in sanctioning the undertaking.

If the part thus completed can be made useful to the public and profitable to the shareholders, the question whether the Court, seeing that the purpose of Parliament

may be better and more effectually accomplished by leaving the matter just as it is, (although what has been done may not be strictly legal), ought not to abstain from interposing its authority to prevent that being done, which would, to some extent, forward the object of Parliament, and at the same time give a profit to the shareholders. The inclination of my opinion is, that, when that case arises, it may be done, though with the greatest caution; at least, I am so far of that opinion, that, if I were satisfied in this case that I could in this way forward the object of Parliament to some though not to the complete and full extent originally intended, and at the same time benefit the shareholders, I should abstain from interfering by injunction; but upon reading and considering these affidavits, I am not at all satisfied that this is the case here: I am not satisfied, that, by allowing this large expenditure (*a*) to be made under circumstances which appear to me illegal, I should either be promoting the object of Parliament or the profit of the parties themselves. I must not, therefore, abstain from acting according to that which has now become the proper and necessary rule of this Court; and I can make no exception in the present instance.

It would be, however, a great mistake to suppose, that, if I had relaxed the rule in the present instance, I should be permitting an infraction of the law. It may be so in a very indirect sense; but it comes to this, that the Court, seeing that the acts sought to be done are not in accordance with the law, but that, nevertheless, under the circumstances, they would forward the public purpose intended by Parliament, and be beneficial to the parties, may abstain from exercising its peculiar jurisdiction by way of injunction in such a case. This does not make it in the least degree legal: the Court only withholds its hand and refuses the injunction, but it does no more. The Court cannot, by abstaining from granting an

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(*a*) 20,000*l*.

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injunction, make that legal which is in itself illegal; and nothing which the Court may do can exonerate the party from any of the consequences or liabilities to which they may be exposed, either at law or here, in respect of the acts. The effect of these affidavits is this: the defendants believe that this portion of the line of railway, which has been completed, would be rendered more profitable by further expenditure. One witness says, that the present accommodation is not adequate; but another says it is. That is not sufficient foundation for me to proceed on.

I think that I have a right to exercise a discretion in this case in which it clearly appeared to me, as it might have been done in this case, that the railway was ready for traffic, but that the traffic could not be carried on without station accommodation.

I can conceive cases of that sort, brought forward with such strong circumstances, that I should think it very fair and reasonable not to interfere by injunction, but in this case I must grant the injunction.

April 15th.

The injunction was ultimately drawn up in the following form:—

“That an injunction be awarded against the said Shropshire Union Railways and Canal Company, and against the directors [nominating them] to restrain them, as directors of the said Company, from applying any monies now in the hands of them or any of them, which have been paid by the holders of the 20*l.* shares of the said Company for or in respect of the shares held by them in the said Company, or which may hereafter be received by them under the provisions of the ” [three Acts, 1846] “for the purpose only of completing the railway and works from Shrewsbury to Stafford, or otherwise, except for the purpose and with a view to the construction of the whole of the railways and works authorised to be constructed under the powers and provisions of the ” [three Acts, until answer or further order.] “But this order is not to extend to prevent the defendants from paying debts or liabilities of the said Company contracted before the date of the notice of motion of the 15th of December 1849, or the current expenses of maintaining and working the said railways and canal.”—With liberty to apply.

The plaintiff moved for an injunction to restrain the defendants from declaring the shares held by him to be forfeited for non-payment of the several calls of 1*l.* 18*s.*, 1*l.* 10*s.*, and 1*l.*, or from taking any further or other proceedings with a view to declaring such shares or any of them to be forfeited for non-payment of such calls or any of them, until the validity of such calls and the liability of the plaintiff should have been fully determined by a Court of law.

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THE MASTER OF THE ROLLS made an order, giving the plaintiff liberty, on or before the end of Trinity Term, to pay into the Bank, and to be there placed to the credit of the cause, 1814*l.*, being the difference between the proportion of 800,000*l.*, the share capital under the Shrewsbury and Stafford Act attributable to the 660 shares, and the deposits already paid by him; and on such payment being made, an injunction to the effect hereinbefore stated was awarded, but otherwise was refused with costs.

The plaintiff having failed to comply with the condition, the injunction did not issue.

The defendants now appealed from the order of the Master of the Rolls granting the injunction of the 15*th* of April.

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The Railway from Stafford to Shrewsbury had in the meantime been opened for public use, and was then worked by the London and North Western Railway Company.

Mr. *Rolt*, Mr. *Willcock*, and Mr. *Speed* for the appellants.

Mr. *Roundell Palmer* in support of the order.

Mr. *Speed* replied.

The Lord Justice KNIGHT BRUCE, in the course of the

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argument, asked whether the plaintiff had applied for mandamus at common law; which was answered in the negative.

Lord Justice KNIGHT BRUCE—As to this injunction, we have arrived at the same conclusion, but whether precisely by the same course of reasoning it is not very important to inquire. However, I wish the observations I am about to make to be taken as coming from me alone.

I view this injunction in effect as preventing the defendants from applying a single shilling of the corporation money unless for the purpose of paying debts or liabilities which were in existence at the date of the notice of motion at the Rolls, and for the current expenses of the railways or canals which, of course, prevents them from laying out a single shilling in improving the railway or adding to the works or conveniences connected with it. This is the manner in which I understand the order. But what is the state of things to which my observations apply? They apply to a case where, in the first place, a Railway Company, which is importantly interested in the order sought, is absent; a Company which has, under a lease, possession of and the working of the railway; which has the very management of the concern, under the superintendence of a joint committee composed of members of the Railway Company, defendants, and the absent Company. But this is not all. One line of the system of railways in question, namely, that from Stafford to Shrewsbury, being in actual operation, the continuance of such operation is not attempted to be stopped. The plaintiff accedes to the proposition, that, in the actual state of things, this line must proceed and must go on. Indeed, no other proposition can be accepted as reasonable, otherwise a very large amount of property would be doomed to destruction. In such a case, where the plaintiff makes such admissions, and where absent parties are importantly interested, he desires an injunction to prevent the application

of a single shilling in additional buildings and improvements, to make the outlay which has been already incurred profitable to himself and his partners.

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It may be, that these facts are sufficient to enable me to dispose of the case; but this is not all. It has been assumed, that this case is equivalent to that of *Cohen v. Wilkinson*, since here several Acts of Parliament are made and formed into one Act, having reference to the same subject matter, with one capital stock, although to be carried into execution by the construction of various lines of railroad; and it has been assumed, that, because some part of the undertaking has been abandoned and some part retained, therefore a separate and distinct line cannot be made. But it is made and in operation; and if it were not, I am not persuaded that the principle of *Cohen v. Wilkinson* applies here. But more, as a Judge, I am bound, from the facts before the Court, to make the unavoidable inference, that, for more than twelve months before the bill was filed, the plaintiff must have known that the abandoned lines were to be abandoned, and that there was no substantial chance of making either of them within the time fixed by Parliament, and yet there was no bill filed till the month of November, 1849. As a matter of fact, I believe, that, for more than twelve months before the filing of the bill, Mr. Hodgson knew that these lines could not and would not be proceeded with, and that there was no intention existing anywhere to attempt to proceed with them or any of them.

Besides all this, I observe that this is an interlocutory application for an injunction, as to which the Court has always exercised a discretion, balancing and considering whether greater mischief would follow the granting or refusing of the injunction. The plaintiff comes here with a doubtful equity; and I am disposed to think, that, if his equity were clear, greater mischief would be done by granting than by refusing this injunction, and this even to his own property. I find that there has been here an acquiescence

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of a more than ordinary amount, and of a very plain description. My learned Brother agrees with me, and we have arrived at the same conclusion, although, perhaps, not exactly by the same process. We, therefore, dissolve the injunction. But it is said, that this will leave the defendants at liberty to make the Stone and Shallowford branch line. Perhaps this may be so. I am not sure that what is true of one line is not true of the two branches. But these two branches are not yet begun. If they shall be begun, and the plaintiff shall feel himself entitled to complain, he may come here and complain, and he shall be heard. We do not wish to prejudice any question that may arise, but at present it is extremely doubtful whether these two branch lines will be touched. The order we shall make is, to discharge the order and dissolve the injunction, without prejudice to any future application, and without prejudice to any question. Reserve the costs of this motion, and of the motion before the Rolls.

Lord Justice Lord CRANWORTH.—I entirely concur in the order which has just been pronounced. I have come to the same conclusion as my learned Brother, and perhaps by nearly the same reasoning. I confess I had some difficulty in seeing any distinction between the effect of three Acts of Parliament authorising three lines, forming a cluster as it were, and one Act authorising one line. The principle appears to be exactly the same. But, although, when Parliament has authorised one line or one cluster of lines, the parties must execute the whole, and therefore are acting in violation of the Act unless they execute the whole, yet this Court has always exercised some discretion in matters of injunction, especially where they are sought, as in the present case, on an interlocutory application; and I confess, that, when one line only has been authorised to be made, I should feel less unwilling to exercise that discretion than when several lines are authorised to be made; because

when one line of several is completed, this, though not all which is authorised by the Act, is yet a substantial whole in itself; which is not the case where a part only of a single line is in operation. For the exercise of this discretion of the Court of interposing by injunction there is plenty of authority; and I confess, that, if there were neither precedent nor authority, I should not be in any degree reluctant to make one.

In this case the facts are clear. Putting aside the consideration of the two branches to Stone and Shallowford, proposed to be added to the present line, one line is completed; but considerable additional expense may be usefully incurred in rendering the outlay already made, profitable. Now, the effect of this injunction is, that not one single shilling can be expended in this manner. Early in the argument I was struck with the passage in the order appealed from, in which the Master of the Rolls qualified his injunction by the explanation, that he did not mean to include ordinary repairs. Now, the necessity for introducing this qualification led me to doubt whether the injunction could be right in its integrity. Other like modifications suggest themselves to my mind, so as to leave some matters, which clearly ought to be left in the discretion of the committee of management (if they were to have any management at all), untouched by the injunction; and I found that I must extend the qualifications to such an extent as to work a complete modification of the injunction. I was therefore convinced that an injunction was not the right course; for, in fact, the Court cannot anticipate everything which would be required. The necessity for any qualification at all satisfies me that this is not a proper case for an injunction.

With respect to the argument of acquiescence, I fully coincide with what has been said by the Lord Justice *Knight Bruce*, so that I need say nothing more on that head. So much has been done, and so much more remains to be done in order to render the expenditure which has been already incurred useful or profitable, that it would be un-

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from opening the Oxford and Birmingham line for traffic until the Stratford line should be constructed and ready to be opened for traffic, or until the Birmingham and Oxford Company should have given notice to the landowners on the Stratford line of their intention to treat for and purchase lands for the purpose.

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The information stated, that, by the Act of Parliament incorporating the Birmingham and Oxford Junction Railway, with which the General Clauses Consolidation Acts were incorporated, it was recited that the making of a railway from Birmingham to join the line of the Oxford and Rugby Railway at Fenny Compton, with a diverging line of railway therefrom to Stratford-upon-Avon, would be a great public advantage; and that an agreement had been entered into by the Great Western Railway with the Birmingham and Oxford Junction Railway Company and the Birmingham, Wolverhampton, and Dudley Railway Company, that the former Company should purchase the lines of the two last-mentioned Companies; and that it was by such agreement provided, that if the Great Western Railway Company should think fit to require the opening and working of any portion of the said line of railway previous to the completion of the whole, and not otherwise, the same should be opened and worked, according as such portion of the line could be completed, &c.

That by an Act of Parliament additional powers were conferred on the Great Western Railway Company, and the agreement of that Company with the Birmingham and Oxford Junction Railway Company was confirmed; and it was thereby enacted, that there should be a joint board of management selected by the Great Western Railway Company.

That the Birmingham and Oxford Junction Railway Company had raised all the capital for the construction of the entire line of railway, but had given notice to the landowners on that portion only of the line between Birmingham and the place of junction with the Oxford and Rugby Railway, and had

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given no notices in respect of the
upon-Avon; and that, in fact,
lawful authority, to abandon it

The information charged,
legal remedy for compelling the
Junction Railway Company
within the period which then
their compulsory powers of purchase
powers would cease on the 31st
that there was then time for
upon landowners.

The Birmingham and Oxford
and the Great Western Railway
for want of equity and for want of
came on to be heard together.
murrer for want of parties was
the board of management and
defendants.

The *Attorney-General* also
the terms of the prayer of the

Mr. Bethell and Mr. G. L. Es-
murrer contended, that the
any manner interfere on behalf
construction of a railway, it be-
the public would thereby derive
made suffer any injury. That the
Company ought to have been
that the Great Western Railway
terms of their agreement, a right
any part of the railway when
whole were not commenced.

Mr. Bacon and Mr. Daniel
cited *Reg. v. The Eastern Counties*
and *Cohen v. Wilkinson* (b).

(c) *Ante*, Vol. 3, p. 400.

The VICE-CHANCELLOR (without hearing a reply).—The prayer of the information prays a declaration, that the defendants, the Railway Company, were bound to open two lines simultaneously, and that they should not open one without opening the other, or until they had given proper notices to landowners for the purpose of making the diverging line, in other words, that the Company might be restrained from doing one thing unless and until they did another.

A particular injunction was asked and a general injunction, but no specific relief. As to the injunction prayed, I give no opinion what I should have done, if, instead of an information, this had been a bill by a shareholder or landowner, or if this had been an information and bill instead of an information only. I am unable to perceive how the interests of the public at large can be concerned in the prevention of the opening or construction of one part of a railway until another should be commenced or proceeded with, or until certain notices should have been given, although I can understand that private interests are liable to be affected. As to the prayer for general relief, I cannot see what order can be made, unless it be one granting a mandatory injunction, or an order to compel the Company to make the railway along the diverging line. It has been argued, that, although technically, particular relief was not asked, yet, under the prayer for general relief, an order having substantially the same effect as an injunction might be made; upon this I give no opinion. If the public, whose interests are represented by the Attorney-General, are entitled to have the diverging line of railway to Stratford-upon-Avon made, the proceeding by writ of mandamus is open to them. An order for an injunction cannot be so conveniently put in force as a writ of mandamus.

It has been said, that a writ of mandamus could not be procured in time; but if that be so, it does not create an equity on which to come to the Court of Chancery.

The demurrer must be allowed.

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The VICE-CHANCELLOR refused to make any order the motion, except as to the costs, which he ordered to be paid by the defendants.

This was an appeal from the decision of the Vice-Chancellor on the demurrer and motion.

Mr. Bacon and Mr. Daniel in support of the information and of the appeal, contended that there was jurisdiction in the Court to interfere on behalf of the public, where their interests required the assistance of equity, to secure the due execution of that which was for their benefit, and to restrain that which operated to their injury; that the case prayed was analogous to that sought in respect of the administration of charitable institutions. That an application for an injunction in a case of this sort was in effect a motion for an equitable mandamus: *Blakemore v. The Morganshire Canal Navigation Company* (a), *Re The Eastern Counties Railway Company* (b). The Act recited that the construction of the railway would be of great "public advantage," which gave the public, by Attorney-General, a *locus standi* in the Court. That, even if it were to turn out to themselves, the Company were under a contract with the public which they were bound to fulfil: *Cohen v. Wilkinson* (c). That the bringing in a Court of law for a mandamus would be attended with great delay; and before any return could be made on the writ, the powers of the Company to take land compulsorily would have expired, and the construction of the railway would be rendered impracticable. That the demurrer of parties must fail, inasmuch as the board of management were in fact the servants of the Company and represented by the defendants. That the Company

(a) 1 My. & K. 154.

(b) Ante, Vol. 3, p. 460.

(c) Ante, Vol. 3, p. 741
 also the two preceding cases.

not, without the aid of legislative enactment, abandon any portion of their undertaking ; and that the Act of the 13 & 14 Vict. c. 83, (The Railways Abandonment Act), gave the power of abandoning a certain portion of a railway, subject to certain conditions and restrictions, to which the defendants had not subjected themselves, they never having made any application to the Commissioners. That it had not been suggested that the Great Western Railway Company had applied for or demanded a partial opening of the line. That no landowners could in that character apply to compel the formation of the railway, as no privity had been created between them and the Railway Company, in consequence of no notices having been given.

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Mr. *Bethell*, Mr. *Rolt*, and Mr. *G. L. Russell*, contra, contended that the Court had never been called on to entertain a suit of the nature of that before it, which was in fact an application to compel the specific performance of an Act of Parliament. That the Attorney-General could only proceed by information in equity, on behalf of the public, to prevent an injury or abate a nuisance. That the non-completion of the branch line had not been shewn to be an injury, and would not amount to a nuisance. That the cases cited were proceedings by bill at the instance and on behalf of shareholders, which were quite distinct from an information. That the equity in the case of a bill arose from the contract existing between the Company and the shareholders as to the completion of the particular undertaking for which they had subscribed, but that no such contract existed between the public and the Company: *Browne v. The Monmouthshire Railway and Canal Company* (a). That the decision in former cases as to acquiescence applied equally to the public, and deprived them of the right to complain. That the power given to the Great Western Railway Company to

(a) Ante, p. 682.

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use any portion of the line when completed, was a permission on the part of the Legislature to complete and open a portion only of the line. That the board of management under the Act, to be selected from several Companies, formed an independent body, which ought to be represented.

Mr. Bacon, in reply, cited *Attorney-General v. The London and Southampton Railway Company* (a), and *Attorney-General v. The Manchester and Leeds Railway Company* (b).

The LORD CHANCELLOR.—The equity on which this information is supposed to be founded, arises out of an alleged breach of a duty imposed by an Act of Parliament. The question is, whether the defendants have failed in the performance of that duty; and, if so, whether the non-performance of such duty gives to the Attorney-General the power to come to this Court, and in effect to compel a specific performance of an Act of Parliament.

The Attorney-General appears here in order that the defendants may be stopped from doing that which is not expressly forbidden by the Act of Parliament; but unless I were prepared to say that the Attorney-General is entitled, in every case where the public interests may be or are alleged to be neglected, to come into equity, I must hold, that, in the present case, no sufficient grounds have been shewn for his interference.

Undoubtedly, the Attorney-General has a right to represent the public, either in equity or by prosecution at law, in cases where the public interests are exposed to danger or mischief; and in the course of the argument, several authorities were cited to shew that such interference is recognised in equity; but the informations in all these cases were

(a) Ante, Vol. 1, p. 283.

(b) Id., p. 436.

directed to the repression of acts which the parties had no legal right to do, and which were not only not authorised to be done, but were in fact acts of public nuisance. I cannot extract from this information any grounds to warrant the exercise of such a jurisdiction in the present case; and under these circumstances the demurrers must be allowed and the appeal motion dismissed.

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BEFORE VICE-CHANCELLOR LORD CRANWORTH.

WEBSTER v. THE SOUTH EASTERN RAILWAY COMPANY.

Jan. 21st &
25th.

THIS was a motion to restrain the defendants, the South Eastern Railway Company, from keeping possession of, or entering or continuing in or upon a certain piece of ground, and also from digging, using, interfering, or in any manner meddling with the same, and from committing any waste or spoil thereon or on any part thereof.

The material facts stated in the bill and affidavits were referred to in the outset of the judgment, and are as follow :—

The bill stated, that the plaintiff, in July, 1836, became seised or otherwise well entitled to an estate of freehold for his life, amongst other hereditaments, of and in a certain piece of land containing about one quarter of an acre ; and that, up to the time of the filing of the bill, he had so remained seised.

That in 1836 the defendants obtained an Act of Parliament, and in 1846 obtained a further Act, 9 & 10 Vict. c. lxiv., empowering them to make a railway from Tunbridge Wells to join the Rye and Ashford Extension of the Brighton, Lewes, and Hastings Railway near Hastings; and under that Act the powers to take land compulsorily were to last for three

A. sold a piece of land, and conveyed it to a Railway Company. After that the powers of the Company to take land compulsorily had ceased, W. claimed the piece of land conveyed by A., and filed his bill to restrain the Company from keeping possession thereof. The affidavits did not shew a clear title in W.:—
Held, by the Vice-Chancellor, that, in a case of disputed title, and in the absence of conclusive evidence of the right of the claimant, the Court will not interfere by injunction, but leave the party to his remedy at law.

but leave the party to his remedy at law.

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years. The bill then stated that the Company in 1849, during the absence of the plaintiff, served notices at Battle Abbey, the seat of the plaintiff, setting forth that they intended to take certain pieces of land, the property of the plaintiff. That the plaintiff being abroad, the Company caused the said pieces of land to be valued; and the sum having been fixed they paid the amount into Court. On the 13th of December, 1850, the Company, without the license, consent, or knowledge of the plaintiff, or of any person on his behalf entered upon, and wrongfully took possession of, a piece of land not included in the former notices and valuation, and commenced using the same for the purpose of their railway, without having made or offered to the plaintiff any compensation in respect thereof.

The plaintiff was absent from home on the said 13th of December, and was not informed of the Company having so entered into possession of the piece of land until three or four days after.

The bill prayed an injunction in the form hereinbefore stated, but did not ask for any other than general relief. It appeared from the affidavits filed on behalf of the Company, that they had in their books of reference and plans stated the piece of land in question as belonging to the Dean of Battle and his issues, who were then in possession thereof; and that they had paid the purchase money and obtained a conveyance from them.

The affidavits were conflicting as to the title of the parties claiming the piece of land in question.

Mr. Maitland and Mr. Schomburgk in support of the motion for an injunction contended that the plaintiff had made out a prima facie case to the piece of land in question; and that the Company had no right to retain possession of or convert the land to their own use, without first settling with him. That the necessity for the Court's interfering at the present time to prevent the use of the land was the more urgent because, if the title of the plaintiff was established, the Com-

pany had no power unless they obtained the plaintiff's consent to take the piece of land at all, their powers to take land compulsorily having expired: *Brocklebank v. The Whitehaven Junction Railway Company*(a), *Kinnersley v. The North Staffordshire Railway Company* (b), and *Barker v. The North Staffordshire Railway Company*(c).

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Mr. Bethell, Mr. R. Palmer, and Mr. Baily contended, that the plaintiff had not shewn a good title to the land in question; that the Company were *primâ facie* owners of the piece of land under the conveyance made to them by the Dean of Battle; and that the Court could not interfere with their possession until a better right had been established at law.—They cited *Davenport v. Davenport* (d), and *The London and North Western Railway Company v. Smith* (e).

Mr. Malins replied.

The VICE-CHANCELLOR.—I am of opinion that no case whatever has been made for relief. The Company do not claim a right to take this piece of land as part of the plaintiff's property under the powers of their Act; but they claim to be themselves the owners, and to hold it under a title adverse to the plaintiff. I find no authority for supposing that the Court will, in such a case, look upon a Railway Company in any other manner than as an individual owner.

In the case of *Brocklebank v. The Whitehaven Junction Railway Company*, the Company were proceeding under the powers of their Act; so in *Barker v. The North Staffordshire Railway Company*. In these cases the decisions of the Court proceeded on this ground, that, where a Company

(a) Ante, Vol. 5, p. 373.

(b) Ante, Vol. 6, p. 662.

(c) Ante, Vol. 5, p. 401.

(d) 7 Hare, 217.

(e) Ante, Vol. 5, p. 716.

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are intending to take away a person's land, that person has a right to say, you shall not enter until you have established your right under your Act to do so. But the ground of those decisions does not apply to the present case, where the Railway Company claim adversely to the plaintiff. It is true, they have taken possession of other lands of his, about which litigation is still proceeding; but this piece of land is no part of that in litigation between the parties. This case does not come within the principle of the cases cited.

If I were to grant an injunction in suits of this nature, I should, instead of preventing, most probably cause irreparable mischief; I should be allowing any third person, after the Company had given their notices and obtained a conveyance of land, to come in, and, by a short statement that he is entitled, call on the Court to interfere and stop the railway. The Court might thereby compel the Company to come to terms with the claimant, and inflict a great injury on them.

There is nothing to shew that it is important to the plaintiff to have the land in question, or that he cannot obtain at law, by action of ejectment, all the relief to which he is entitled.

This renders it unnecessary to consider the question, which is a very difficult and improper one to discuss on an application of this sort—to whom, on the balance of evidence, the land does in fact belong? All I can say is, that the plaintiff has stated facts which, if established, would justify a jury in saying that he is entitled. On the other hand, he is met with statements on the part of the defendants, which would, if established, shew that he was not so entitled. It is a case of very minute circumstances, leaving the matter of title doubtful; the evidence is equipollent.

My opinion therefore is, that, where the question of title is in dispute, a bill filed on claim of right, and no more, will not entitle the plaintiff to call for the summary interference of the Court.

If I were to decide otherwise, the Company, after a com-

promise with the present plaintiff, may have a bill filed against them by any other person claiming a right, and shewing a plausible title ; and the Company may be again stopped.

This case is, in my opinion, a case of adverse title claimed by the plaintiff, with very slight evidence to support it, and by a bill not containing any allegation, that he cannot get all he is entitled to by action of ejectment. If I were to grant this injunction, I should be extending the jurisdiction of the Court beyond what justice requires ; and I must refuse the motion, with costs.

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BEFORE THE LORD-CHANCELLOR.

THE SOUTH STAFFORDSHIRE RAILWAY COMPANY v. HALL

July 18th.

THIS case, which is fully reported ante, Vol. 6, p. 389, was briefly as follows:—

A Railway Company made their line of railway nearly at right angles to and on the level with the road leading from the plaintiff's farm to the village. The plaintiff made a claim for compensation, and served a notice on the Company to compel them to summon a jury under the 68th sect. of the Lands Clauses Consolidation Act, to assess the amount of compensation to be paid to him. The Company filed a bill to restrain him from all further proceedings under this notice, and from taking any other proceedings under the Lands Clauses Consolidation Act, for settling the amount of compensation.

On the 2nd of January, 1851, the Vice-Chancellor granted an injunction, on the authority of a case then recently

A landowner, alleging that his land was injuriously affected by the making of a Railway, gave notice to the Company, under the 68th section of the Lands Clauses Consolidation Act, to summon a jury to assess the amount of compensation. The Company filed their bill, and obtained an injunction to restrain the landowner from proceeding under his notice. The

injunction was granted by the Vice-Chancellor ; but, in consequence of a decision of the then Lord Chancellor, the injunction was afterwards dissolved. In the interval, the twenty-one days, within which the Company were to summon the jury or in default to pay the full amount claimed, expired, but no mention was made of this fact on the motion to dissolve. The Company then applied to the Lord Chancellor to alter the order, by imposing terms on the landowner, so that he should not avail himself of the lapse of time, such lapse having been occasioned by the decision of the Court. The Court refused to accede to the application.

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decided by the Lord Chancellor *Cottenham* (a). A motion was made on the 24th of February, 1851, on the authority of a case decided by the Lord Chancellor *Truro* (b), to dissolve the injunction; and the Vice-Chancellor dissolved the injunction accordingly.

By the 68th section of the *Lands Clauses Consolidation Act*, it is enacted, "that, unless the promoters of the undertaking be willing to pay the amount of compensation so claimed, and enter into a written agreement for that purpose, they shall, within twenty-one days after the receipt of such notice, issue their warrant to the sheriff to summon a jury for settling the same in the manner herein provided; and, in default thereof, they shall be liable to pay to the party so entitled as aforesaid the amount of compensation so claimed; and the same may be recovered by him with costs by action in any of the superior Courts."

The twenty-one days limited by the foregoing section expired before the day on which the injunction was dissolved; so that the Company thereupon became liable to pay the plaintiff the full amount claimed by him for compensation, without any intervention by a jury to assess the value.

On the application to dissolve the injunction before the Vice-Chancellor, it was not submitted to his Honour, that the Company were in this difficulty, or that they wished to be relieved from it by any modification of the order; which, accordingly, was drawn up absolutely.

This was an application by way of appeal to the Lord Chancellor, to modify the order dissolving the injunction, so as to place the Company in the same position as that in which they were at the time the original order for the injunction was granted.

(a) *The London and North Docks and Birmingham Junction Western Railway Company v. Railway Company v. Gatlke*, ante, *Smith*, ante, Vol. 5, p. 716. Vol. 6, p. 371.

(b) *The East and West India*

Mr. *Rolt* and Mr. *Speed* for the Railway Company, did not contend that the decision of the Vice-Chancellor in dissolving the injunction was wrong, in any other way than that it had not imposed terms on the plaintiff; but they argued, that the Company ought not to be in a worse position, after having obtained a decision in their favour, than they were in before. That the Court frequently restrained the exercise of a legal right. That the proceedings by the plaintiff against the Company were in the nature of a suing for a penalty; and that the Court could amend a judgment or set it aside if equitable grounds were shewn for so doing. That, although a man may have a good action of debt against another, the debtor might apply to a Court of equity to restrain an execution upon his goods, if it had been irregularly obtained.

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Mr. *J. Parker* and Mr. *Willcock*.—The Company have only themselves to blame for the position in which they are placed. By their bill they stated that the plaintiff had no legal right to compensation, and they asked the Court to restrain him from proceeding at law. If he have a legal right, the allegation in the bill is unfounded, and he is entitled to all his remedies. The Court would not attempt to impose an undertaking on the plaintiff; because, if the plaintiff refused to submit to it, the Court could not enforce the injunction. The claim made by the plaintiff is not a penal sum, but a statutory debt. The Company have their defence at law to the action, they have also permitted the plaintiff to commence his action, and have delayed this application to the Court from February to July.

The LORD CHANCELLOR, in the course of the plaintiffs' argument, referred to the cases of *Waterford v. Knight* (a) and *Norbury v. Meade* (b), and without hearing the counsel

(a) 11 Cl. & F. 653.

(b) 3 Bligh, 211, 245.

when there never was a good ground for it. Again, the plaintiffs have precluded asking any favour of the Court, by the conflict between the order of the Vice-Chancellor and this application. They have applied in March, instead of leaving the defendant to file his declaration, and to have proceedings at law until the present time. I have, as I understand it, put in the case which they have tried to establish in equity, and I find no other ground for the Court's not interfering with the order of the Vice-Chancellor, by its decision on the defendant.

Mr. *Speed*, on behalf of the Company, could not contend against an opinion so strong as that of the Vice-Chancellor, and he has proceeded with his argument.

The LORD CHANCELLOR then said:—
with costs.

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BEFORE THE HOUSE OF LORDS.

LETTS v. THE LONDON AND BLACKWALL RAILWAY
COMPANY.*March 4th &
10th;
August 8th.*

THIS was an appeal against a decree of Vice-Chancellor Sir *James Wigram* (a), in a cause in which the Rev. James Letts, the rector of the parish of St. Olave, Hart Street, City, was the plaintiff, and the proprietors of the Blackwall Railway the defendants. Under 37 Hen. 8. c. 12, the Act for tithes in London, the rectors of certain parishes in London were entitled to claim 2s. 9d. in the pound upon the rent received on all houses in their respective parishes in lieu of tithes. The plaintiff sought by his suit to obtain a decree for the payment of a sum of money, by way of compensation, in lieu of tithes, under the provisions of the Act 2 & 3 Vict. c. xcv., intituled "An Act for extending the line of Railway between London and Blackwall, and called the Commercial Railway, and for amending the Acts relating thereto." By that Act, a Company which had been incorporated by the 6 & 7 Will. 4, c. cxxiii., was authorised to construct a Railway from a certain part of the City of London to Blackwall. In the 33rd section of the Act 2 & 3 Vict. c. xcv., a provision was contained for indemnifying the clergy in the parishes of the City of London, through which the railway was proposed to pass, for the loss of the money payment in lieu of tithes which they would sustain by the removal of the buildings by the

Under "The Act for Tithes in London," (37 Hen. 8, c. 12), the rector of St. O. was entitled to claim 2s. 9d. in the pound upon the rent received on all houses in his parish, in lieu of tithes. A Railway Company, under the powers of their Act, took thirty-three of the houses in the said parish, being bound by the 33rd section of one of their Acts to pay to the rector such yearly sums in respect of such houses, "according to the last assessments thereof to the 25th of March last," as would be equal to the loss in tithes which he

might sustain for want of occupiers by reason of such taking:—*Held*, by the House of Lords, reversing the decision of Vice-Chancellor *Wigram*, that "the last assessments to the 25th day of March last," were the payments made to the rector in lieu of tithes for a period up to and ending the 25th of March.

(a) The facts are given in extenso in the report of the case before Vice-Chancellor *Wigram*, Ante, Vol. 4, p. 530.

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Railway Company. And it was enacted, that annual sums of money equal to the loss in tithes, or sums of money or customary payments in lieu of tithes, which the rectors might sustain by the want of occupiers by the taking down of houses, estimated according to the last assessments thereof to the 25th day of March, 1839, should be payable to the said rectors by the Railway Company.

Two questions arose for decision in the suit, the one, whether the rector was entitled to a decree for the payment of 2s. 9d. in the pound upon the annual value or rent of the premises which the Company had removed under the authority of the Railway Act, during the period the land remained vacant, and therefore not liable to assessment in respect of tithes, or whether the rector's right during that period was limited to a payment according to the rate which had been paid for the quarter ending at Lady-day, 1839, by the occupiers of the premises which had been removed. Secondly, whether the liability of the Company in respect of the premises which had been removed was continued until any newly erected or substituted premises should become productive to the rector, or only during the time the ground from which the premises had been removed, and the newly substituted premises, should not be liable to assessment.

The Vice-Chancellor, by his decree, declared the plaintiff Letts entitled, subject to certain deductions for sums received by the plaintiff, to be paid tithes after the rate of 2s. 9d. in the pound on the annual values of houses and other buildings taken by the defendants the Railway Company, as such values had been agreed on between the rector for the time being of the parish of St. Olave and the respective occupiers for the time last before Lady-day, 1839. And as to any of the houses, in respect of which the Master to whom the inquiries were referred should find that no agreement had been entered into, the Master was to take the annual sum last collected by way of tithe thereon

as representing 2s. 9d. in the pound on the annual value thereof.

The Master made his report, to which exceptions were taken by the Railway Company; but it was on the 17th of July, 1848, confirmed.

The Company appealed from the decree of the 30th of January, 1847, and the order confirming the report.

Mr. *W. P. Wood* and Mr. *Bigg*, for the Railway Company, the appellants, cited *The Minor Canons of St. Paul's v. Crickett* (a) and *Macdougall v. Purrier* (b).

The *Attorney-General* and Mr. *Speed*, for the respondent, cited *Grant v. Cannon* (c), *Antrobus v. The East India Company* (d), *Vivian v. Cochrane* (e), and *Glamorganshire Canal Company v. Blakemore* (f).

Mr. *W. P. Wood* replied.

The LORD CHANCELLOR, in moving the judgment of the House, said that the object of the Act 2 & 3 Vict. c. xcv. was to give indemnity, and indemnity only, to the incumbents of the different parishes in respect of the buildings which the Railway Company in the progress of their works should remove. That a construction of the section which would subject the Company to the payment of a greater amount than the rector would have received if the Company had never existed, was not consistent with that object. That the sums demanded by the clergy and paid by the occupiers would, within the meaning of the Act, conclusively prove what had been the "assessments" of the occupiers so paying to the 25th March, 1839. That the

(a) 2 Ves. jun. 563; S. C., 3
Eag. & Y. 866; 5 Price, 14.

(b) 2 Dow & Cl. 135.

(c) 1 Eag. & Y. 582.

(d) 2 Eag. & Y. 544; S. C., 13
Ves. 9.

(e) 4 Hare, 167.

(f) 1 Cl. & F. 262.

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word assessments did not refer to the assessments for the poor-rate. That, while the Company should be charged for the interval during which compensation was payable according to the payments made by the respective occupiers to the 25th March, 1839. credit should be allowed to the Company for such tithe-rent as should have become payable in respect of the new buildings erected in the place of those removed by them.

The cause was then ordered to be remitted, and the costs of the appeal reserved, which left those costs in the discretion of the Court below.

The following order was entered on the Journals (a):—

Ordered, that the said decree and order in the said petition and appeal complained of be, and the same are hereby reversed. And it is hereby declared, that, according to the true intent and meaning of the 2 & 3 Vict. c. xcv., the assessments to the 25th day of March then last therein mentioned, were the payments made to the rector in lieu of tithes for a period up to and ending on the said 25th day of March therein mentioned; and that, in taking the accounts between the appellants and the respondent, the appellants should be credited with all sums paid by them to the respondent for tithes and also with all sums of money in lieu of tithes which have become payable to the respondent by any person or persons other than the appellants in respect of the premises which may have been taken by the said appellants under the powers and authorities of the said Acts. And it is further ordered that with this declaration, the cause be referred, &c.

(a) Lords' Journals, 1851. p. 514.

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BEFORE VICE-CHANCELLOR SIR JAMES PARKER.

THE GREAT WESTERN RAILWAY COMPANY v. RUSHOUT
and Others.

Feb. 20th,
23rd, & 24th.

THE bill in this suit was filed on the 9th of February, 1852, by the Great Western Railway Company, on behalf of themselves and all other shareholders in the Oxford, Worcester, and Wolverhampton Railway Company, except such of the defendants as were shareholders therein, against the directors [nominatim] of the last-mentioned Company, the Company, and J. R., Viscount B., E. W. M., and W. T., the registered holders of a large number of shares, upon trust for the Great Western Railway Company, under deed dated the 23rd of March, 1848, as defendants.

The facts stated in the suit (*Beman v. Rufford*, ante, p. 48) shew the position of the several parties at the date of the commencement of the present suit.

The Great Western Railway Company was authorised by Act of Parliament to subscribe to the O. Railway Company, and the shares were vested in trustees for them, and they were to have certain powers with reference to the management and the appointment of six directors. The directors of the O. Railway Company,

after unsuccessful attempts to enter into an agreement with the Great Western Railway Company appointed a special committee, from which the directors appointed by the Great Western Railway Company were excluded, and, without the sanction of the latter Company, determined to construct an extension line, and to apply to Parliament for the necessary powers for that purpose; and notices of such intended application were duly advertised. The Great Western Railway Company thereupon filed their bill, praying for an injunction to restrain the O. Railway Company and their directors, other than those who were directors of the G. W. Railway Company, from using the funds and monies of the O. Railway Company in or towards payment of the costs occasioned by the new scheme, or in promoting the said bill or any other bill for the like purposes; and from entering into any contracts in the name or on behalf of the O. Railway Company with reference to the said or any like scheme, or to the said bill or any other bill for the like purposes; and from excluding the said six G. W. directors or any of them, or any other of the G. W. directors, from access to any information concerning the proposed scheme and the promotion of the said bill; and from excluding the said six directors from full participation in and management of the affairs of the O. Railway Company, and from access to their books, papers, &c.; and from receiving full information of the proceedings of every committee of the Company's directors:—*Held*, that the interest of the G. W. Railway Company was sufficient to maintain the suit, and that it was properly framed. That the application to Parliament for an extension line was a lawful object if lawfully pursued. That, to defray the expenses of applying to Parliament out of the funds of the Company was an illegal application. That, although the voice of a minority, if present, might not affect the result of the resolutions of a meeting, the exclusion of that minority rendered the meeting illegal.—Injunction granted accordingly.

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No case was stated, pursuant to the order made in that suit, for the opinion of a Court of law as to the validity of the agreement between the Oxford, Worcester, and Wolverhampton Railway Company, (hereafter called, for the sake of brevity, the Oxford Company,) and the London and North Western and Midland Counties Railway Companies; and that agreement was in fact abandoned. Subsequently, the terms of an agreement between the plaintiffs and the Oxford Company were proposed and submitted to the shareholders, but nothing was finally determined on between the two Companies.

The bill stated, that, although the capital of the Oxford Company was not more than sufficient to complete their own line, they had determined to make a narrow-gauge extension line from Wolvercot to join the South Western Railway near Brentford, and had given notice of their intention to promote a bill in Parliament to authorise that extension. That all preliminary proceedings had been taken for introducing the bill, and that the directors had improperly used the name and seal of the Company, and pledged its credit in support of the scheme. That the subscription contract was illegally got up; and that one eleventh of the capital subscribed was belonging to and out of the funds of the Company. That, in 1851, the directors had appointed "The General Purposes Committee," from whose meetings the six directors selected by the Great Western Railway Company under their powers had been excluded; and that such committee had done acts and appointed engineers and a surveyor; and it had been resolved that their proceedings should be kept secret from the Great Western Railway Company.

The bill then charged the illegality of these proceedings, and prayed an account of the monies expended out of the funds of the Company about the said extension scheme, and that such monies might be made good by the defendants other than the Great Western

directors, and that they might indemnify the Oxford Company against all engagements entered into by them with reference to the extension scheme; and that the Oxford Company and the directors thereof might be restrained, by injunction, from using or applying the [name, seal,] funds, and monies of the said Oxford Company for or towards the payment of any costs, charges, or expenses of or relating to or in any manner occasioned by the scheme for the extension railway in the bill filed in this cause mentioned, or the soliciting or promotion thereof, or of the bill, as in the said bill mentioned, introduced or about to be introduced into Parliament, as in the said bill also mentioned, or in anywise connected therewith, or from or by reason of any other bill or scheme for the like purpose; [and also from introducing or soliciting the said bill, or any other bill for the like purposes, or using the name or seal of the said Oxford Company for the introducing or soliciting of such bill;] and, in particular, from entering into any contracts, agreements, or engagements in the name or on the behalf of the said Oxford Company with reference to the said proposed undertaking, or any other scheme for the like purpose or the promotion thereof, or with reference to the said bill or any other bill for the like purpose, or the soliciting or promotion of any such bill; and also from excluding the [six directors selected by the Great Western Railway nominatim], or any of them, or any other of the Great Western directors of the said Oxford Company, from full and free access to and inspection of, and obtaining full and complete information touching and concerning, all agreements, contracts, reports, correspondence, proceedings, acts, matters, and things, made, done, received, passed, entered into, or had by any of the directors or officers, servants or agents of the said Oxford Company, relating to or concerning, or in any manner touching or connected with, the said proposed scheme or undertaking, or the solicitation or promotion of the said bill, or any matter an-

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tecedent or preliminary thereto respectively, or connected therewith respectively; and also from excluding the said six directors or any of them, or any other of the Great Western directors of the said Oxford Company, from the full and free participation in and management of the affairs of the said Oxford Company, and from full and free access to all the books and papers and proceedings of the same Company, and of the officers, servants, and agents thereof, and from receiving full information in all respects as to the resolutions, deliberations, and proceedings of all and every of the committees of the same board of directors appointed and to be appointed.

The plaintiffs now moved for an injunction in the terms prayed by the bill. Affidavits were filed, the material parts whereof are sufficiently referred to in the judgment.

Mr. *Malins*, on behalf of the defendants, took a preliminary objection, that the Great Western Railway Company, not being the registered owners of shares in the Oxford Company, had not such an interest as to enable them to maintain a suit. The *Vice-Chancellor*, however, considered the objection to be more in the nature of a defence to the motion than of a preliminary objection.

Mr. *Bethell* and Mr. *G. L. Russell*, in support of the motion, cited *The Attorney-General v. The Corporation of Norwich* (a), *The Attorney-General v. The Guardians of the Poor of Southampton* (b), *Colman v. The Eastern Counties Railway Company* (c), *Munt v. The Shrewsbury and Chester Railway Company* (d).

Mr. *Malins*, Mr. *Follett*, and Mr. *Bovill*, contra, cited

(a) 16 Sim. 225.

(b) 17 Sim. 7.

(c) Ante, Vol. 4. p. 513.

(d) Next case.

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Ware v. The Grand Junction Waterworks Company (a), Heathcote v. The North Staffordshire Railway Company (b), Stevens v. The South Devon Railway Company (c), Parker v. The River Dun Navigation Company (d), Hodgson v. Earl Powis (e), Foss v. Harbottle (f), Lord v. The Copper Miners Company (g).—They referred to the 94th, 95th, and 96th sections of the Companies Clauses Consolidation Act, as legalising the appointment of the “General Purposes Committee;” that committee having been appointed by a general Board of Directors, at which the directors selected by the Great Western Railway Company might have been present if they had wished. They also urged that the plaintiffs were not entitled to relief, on the grounds of delay and acquiescence.

Mr. *Bethell* replied.

The VICE-CHANCELLOR.—The first question that occurs here is as to the form of the suit. The bill is filed by the Great Western Railway Company, on behalf of themselves and all other the shareholders in that Company, seeking the relief prayed by the bill. It appears by the bill and upon the affidavits that the plaintiffs are not shareholders in their own name in the Oxford Company; but the bill states, and it is proved by affidavit, that they have a large number of shares standing in the names of four persons, who are trustees for the Company, and who are named as defendants to this record. In that state of things, it was contended that the Company had not such an interest as enabled them to maintain this suit on behalf of themselves and of all other shareholders.

With reference to that question, I think they have a suffi-

(a) 2 Russ. & My. 470.

(b) Ante, Vol. 6, p. 358.

(c) Ante, p. 696.

(d) 1 De G. & S. 192. See *Graham v. The Birkenhead &c. Rail-*

way Company, ante, p. 938.

(e) Ante, p. .

(f) 2 Hare, 641.

(g) 2 Ph. 740.

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cient interest to maintain this suit. There is a valid trust—beyond all doubt valid—on which these shares are held for the Great Western Railway Company; they are the only persons who, under that trust, are interested in the shares. They have, therefore, an interest in what is sought by this bill, viz. to protect the property and concerns of the Oxford Company. Now, it is very true, that, for many purposes, Companies are only bound to regard the legal title; one of the clauses of the general Act (a) is, that they shall not be bound to see to the execution of any trust. But they are not asked here to see to the execution of any trust: they are only asked to act on the title, which is a trust executed, and is an equitable and not a legal title enabling these parties to maintain this suit. This does not in any way change the jurisdiction on the subject-matter. if I may assume, that, for this purpose, the legal shareholders themselves could maintain this bill. It is not like those cases in which the cestui que trust, suing in this Court and making the trustee a defendant, asserts a right against another party, which is a right to be asserted by the trustee in a Court of law. The trustee, or cestui que trust, can sue in this Court, and therefore that objection cannot apply: and when there is the additional fact that the trustee himself, the person who is legal owner of the shares, is a party to the suit, and bound by the proceedings, I confess I do not see any objection to the frame of the suit. Moreover, the Act of Parliament itself assumes that the Great Western Railway Company may have an equitable title in these shares, where it provides, in the 12th section, “that, having taken these shares, they may guarantee interest on the money necessary to enable them to take the shares, on such conditions as the holders for the time being of the shares, or the parties in whose hands they may be placed as security, may mutually agree upon.”

(a) Companies Clauses Consolidation Act, 8 & 9 Vict. c. 16, s. 31.

It appears that these shares are, in fact, placed in the hands of trustees, subject to a certain guarantee, and pursuant to that clause.

We have, then, the Great Western Railway Company here precisely in the position that the Act of Parliament regulating the Company, which is now before the Court, contemplated, namely, having an equitable title in these shares, subject to certain guarantees by other persons, who are the owners of the shares; and, for these reasons, I think the suit is properly constituted as to the frame of it.

The next question is, as to the real nature of the motion now before the Court. The application to Parliament, which is the subject of this suit, is to vary the object and scheme of this Railway Company, and to obtain an Act for that purpose. The objects of the Act so applied for are fully stated in the advertisement contained in the Gazette, which appeared on the 11th of November and on some subsequent occasions. Now, in my opinion, having regard to the cases that have been referred to, the object of the application to Parliament, as appearing by those notices, is a lawful one, if lawfully pursued. Parliament created this Company, and having created it, I think the power must rest with Parliament to vary the constitution of the Company, to control it, to annihilate it, or to deal with it as it shall in its wisdom think fit. Any argument addressed to me as to the application to Parliament for varying the original object being a thing beyond the scope of the Act, should be addressed to Parliament and not to this Court. I therefore think, as I said before, that there is nothing illegal in the object of this application to Parliament, assuming it to be legally pursued by the Company.

Now, the notice appeared in the Gazette on the 11th of November; and there is a resolution of the General Purposes Committee on the same 11th of November, directing

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the solicitor to take measures to lay before Parliament a bill, which was brought before the whole Board, and was known to the Board of Directors on the 19th of November, 1851. It does not appear to me that that advertisement, or that which was done, was in the least degree necessarily calculated to apprise the parties who represented the Great Western Railway Company of any intention to appropriate the funds of the Company improperly in the application to Parliament. I think, as it has been contended, that they might fairly suppose that the subscribers' contract and the deposits were made, not out of the funds and monies of this Company, but out of the monies of persons who came forward independently, and that it was quite competent for these parties, for anything that appears in this resolution, to come forward with their own monies, to pledge their own credit, and to find the means for going on with this application to Parliament.

It does not appear to me, therefore, on the point of acquiescence, that, down to the 19th of November, 1851, it must be necessarily taken to be known to the parties, that there was any intention of improperly dealing with the funds of the Company. Then we find resolutions of the General Purposes Committee of the 16th, the 23rd, and 24th of December, and on subsequent occasions, from which it appears that they have entered into onerous contracts on the part of the Oxford Company, not only for spending money, but binding themselves to pay salaries, and incurring other expenses on account of the Company at the time I have mentioned. All this is not alleged to have been known to those of the directors of the Oxford Company who were appointed by the Great Western Railway Company, till the 28th of January following. Again, it is clear, and not in dispute in the affidavits, that the Company mean to make use of the funds, and to pledge the credit and to enter into contracts on behalf of the Oxford Company, for the purpose of promoting this application

It is said, that it is to be a temporary use only; but it is nowhere alleged that the expenses, which may be very great, for promoting it in Parliament, and other things of that kind, are not meant to be defrayed out of the funds of the Company. Now, upon all the authorities referred to, that is an unlawful application of the funds—an application which this Court will not permit; and I do not see any difference between applying the funds of the Company and entering into contracts in the name of the Company for this purpose. It appears to me, upon the authorities that have been referred to, that there can be no doubt that this is a course of things that the Court will interfere to restrain; and I have no doubt, therefore, as far as the injunction is sought as to that, that the injunction ought to be granted.

The next question is, as to the exclusion of the Great Western Railway Company's directors from the meetings of the Board, and the concealment from them of what has been going on. It was said at the bar, that that course of proceeding was strictly within the letter of the law. I certainly was surprised to hear that stated; because it is a principle which governs not only bodies of this kind, but also private partnerships, that, where there is a body of persons in which the majority is to bind the minority, it is essential to the validity of all their acts, that the voice of the minority should be heard—that the minority should have an opportunity of stating their views—and it is not till they have had that opportunity that the acts of the majority become binding on the minority; and I think Lord *Eldon's* opinion may be referred to, as shewing, that, when the minority have a voice given to them, if there has been a combination among the majority before that voice was received to overbear it, he should consider the acts of such a body illegal; and that opinion is founded upon the principles of this Court.

Now, it appears to me, without stopping to consider how the case stands in the affidavits before that time, that the

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resolution of the 28th of January, and that which followed it on the 4th of February, viz. the appointment of a committee for the purpose of carrying out the resolution—was a course of proceeding which the Court has not any difficulty in deciding ought to be restrained.

Then it was argued, that this was a matter forming part of the internal regulations of the Company, and to be dealt with by the Company itself, and which ought not to be subject to the interference of this Court; but how could the Company deal with it? By a meeting being called of the directors—of course, they would not be the parties who would be likely to call a meeting, and it would be a long time before the shareholders could call one; but, if they did, it is probable, that that meeting might not support the directors in the course they thought fit to pursue, and then they must apply for a mandamus, and all this to obtain an object which it is absolutely necessary should be done at once. It appears to me there can be no doubt whatever that the aid of this Court is properly called in to prevent such a course of proceeding as that.

That disposes of all the objects of the notice of motion except one, which is, to restrain the defendants “from introducing or soliciting the said bill, or any other bill for the like purposes, or using the name or seal of the Company for the introduction or soliciting of such bill, and, in particular, from entering into any contracts, agreements, or engagements, in the name or on the behalf of the Company, in the introduction or soliciting the bill.” That is the point in this case on which I have had the most difficulty. I felt the force of Mr. *Bethell's* argument, which is this, that the introduction of this bill cannot be considered as having been done on behalf of the Company by the body who were intrusted by the Company with the care of the common seal for this purpose; it was done by a section of that body, acting, as it appears to me, on many occasions, illegally, and excluding the voice of the minority. It is

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that portion of the case which has created considerable difficulty in my mind how to deal with it. But the order that I shall make with respect to the other parts of this application, in the first place, will be to prevent the use of the Company's funds, or the pledging of their credit in any way, for the purpose of promoting their bill in Parliament. It will also insure to the Great Western directors, and the whole body of shareholders who have an interest in having the whole Board present, that the Great Western directors shall have a voice in all the subsequent proceedings relating to the conduct of this bill in Parliament; and considering that the proceedings of Parliament are now inchoate only, there will be ample opportunity hereafter, pending the bill in Parliament, for the Great Western directors to have all their powers restored to them, and to have full access to the meetings of the Board to discuss and debate what ought to be done in Parliament. I do not think I can interfere to restrain the defendants to the extent to which this notice of motion goes—to restrain them from soliciting this bill in Parliament, or any other bill for the like purpose.

An order was then made in the terms of the notice of motion, omitting the words within the brackets, ante, p. 993.

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BEFORE THE MASTER OF THE ROLLS.

*April 6th &
19th;
July 16th.*

**MUNT v. THE SHREWSBURY AND CHESTER RAILWAY
COMPANY.**

A Railway Company was authorised to make certain branch railways to the River Dee, and to make approaches and such other works as they might think necessary. The navigation of the river being neglected by

the conservators, the directors of the Railway Company received the sanction of the shareholders at a public meeting to take such steps and incur such necessary expenses as appeared to them calculated to improve the navigation. The directors thereupon promoted a bill in Parliament for the purpose of appointing new conservators of the river, and expending some of the funds of the Company in this object. Some dissentient shareholders thereupon filed a bill, and moved for an injunction to restrain the directors from applying the monies of the Railway Company in promoting a bill in Parliament, or for any other purpose not authorised by the Acts of Parliament relating to the Railway Company.

The Master of the Rolls granted the injunction as moved for.

(a) 12 & 13 Vict. c. lv. is intitled "An Act to authorise the Shrewsbury and Chester Railway Company to make certain branches to the river Dee, with wharfs and other conveniences connected therewith." [This Act refers to all the previous Acts relating to the Company.]

By the 5th sect. the Company were empowered to make and maintain the several branch railways with all proper works and conveniences respectively connected therewith, as therein after mentioned, viz. a branch

from and out of the line of the Shrewsbury and Chester Railway, at or near a field numbered 59, in the parish of St. Mary the Hill, in the county of the city of Chester, and terminating in the same parish, at or near to the river Dee in or near to a piece of marsh land belonging to the company of proprietors of the undertaking for recovering and preserving the navigation of the river Dee; also another branch railway commencing by a junction with the last-mentioned branch railway at a point therein

The bill, after setting out certain sections of the different Acts of Parliament incorporating the Company, stated, that all the capital which the Company were authorised by their several Acts to raise had been raised, and that they had borrowed 325,160*l.* under their powers for that purpose; and that such capital was not more than sufficient for the completion of their railways and works.

The bill then stated the several Acts of Parliament passed for the conservancy of the river Dee; and that certain persons had been incorporated for that purpose under the name of "The Company of Proprietors of the undertaking

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mentioned, and terminating on, in, or near to the river Dee, at a certain other point therein mentioned. "And also to make and maintain in connection with the said branch railways all necessary and proper sidings, stations, bridges, river-walls, embankments, piers, quays, wharfs, jetties, landing and shipping places, sheds, warehouses, depots, approaches, communications, and other works within the limits of deviation defined upon the plans hereinafter mentioned."

By the 11th section, it was enacted, that, subject to the provisions in the said Act contained, "it shall be lawful for the said Company to make and maintain the said branch railways, piers, and works connected with the same respectively, in the lines and situation, and upon the land delineated on the said plans and described in the said books of reference, and according to the levels defined on the said sections, and within the limits aforesaid

to make and maintain such piers, quays, landing places, approaches, wharfs, and other works and conveniences, as they may think necessary, for more effectually working the traffic of the said Shrewsbury and Chester Railway, or otherwise.

By the 12th section, it was provided, "that the wharfs, piers, jetties, or other works to be made and executed under the powers of the said Act should not extend into the river Dee beyond the line" therein pointed out, being the top of a proposed river-wall described in certain plans therein referred to.

By the 24th section, the Company were empowered to take certain tolls for ships loading or unloading at their piers.

The 29th section gave power to contribute to the Shrewsbury and Hereford Railway, and to raise money for that purpose, and provided for the due application thereof.

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for recovering and preserving the Navigation of the River Dee," on whom the necessary powers were conferred; and on failure of the performance of their duties, certain commissioners were, by an Act, 6 Geo. 2, c. 30, appointed to enter upon and undertake the same.

That the conservators had duly performed their duties.

That the Railway Company had a merchandise and mineral station at Saltney, on the banks of the River Dee; and that, at a meeting held on the 23rd of February, 1849, a resolution was passed by the directors and a majority of the shareholders present at such meeting, that the directors should be authorised to take such steps and incur such necessary expenses as might appear to them calculated to promote the improvement of the river Dee, with a view to the extending of the traffic of the Railway Company.

That at a general meeting, held in February, 1850, the directors, by their report, stated that a bill had been brought into Parliament, and that they were prepared to support such bill, in accordance with the authority given to them by the general meeting of February, 1849.

That the bill so referred to was intituled a bill "for the Conservancy and Improvement of the River Dee;" the object of which was to transfer the conservancy of the river and all powers to twelve commissioners, to be called "The Dee Conservancy and Improvement Commissioners;" ten to be nominated by the citizens of Chester, and two by the Railway Company.

That the bill had been brought into Parliament by the directors of the Railway Company; and that the expense of promoting it had been borne by the Railway Company, with the exception of a sum of about 200*l.*; and that great expenses would be incurred in promoting the bill in Parliament, as it was vehemently opposed by the present conservators.

The bill, after stating that the directors of the Railway Company had actually advanced 2000*l.* part of the funds of

the Company, to be applied towards payment of the expenses of promoting the bill in Parliament, and that they intended to apply further sums to the same purpose, prayed a declaration that it was not within the powers of the Shrewsbury and Chester Railway Company, or of the directors thereof, and that it would be a breach of trust in the directors, to apply any part of the funds of the Company for any purpose not authorised by their Acts of Parliament, or to prosecute or promote the bill in Parliament for the conservancy and improvement of the river Dee at the expense of the Railway Company, or to take any step or to incur any expense in the name or on account of the Railway Company, with a view to improve the navigation of the River Dee; and that the directors might be restrained from promoting or prosecuting the bill in Parliament for the conservancy and improvement of the river Dee at the expense of the Railway Company, or on the security of any of the monies or funds thereof; and from applying, or causing or permitting to be applied, the said sum of 2000*l.* or any part thereof, or any of the monies or funds of the Railway Company, in or towards payment of any expenses already or thereafter to be incurred in or about the preparation, prosecution, or promotion of the bill in Parliament, or in anywise relating thereto, or for any other purpose not authorised by the Acts of Parliament relating to the Railway Company; and from taking any steps or incurring any expense in the name or on account of the Railway Company with a view to improve the navigation of the river Dee.

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The plaintiffs now moved for an injunction in the terms of the prayer of the bill.—Mr. *Turner* and Mr. *Roupell* were heard in support of the motion.

April 19th.

Mr. *Malins*, on behalf of the defendants, stated, that, in consequence of the delay in bringing forward the motion, the sum of 2000*l.* had already been expended; whereupon the Master of the Rolls declined proceeding with the mo-

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tion, on the ground that he could not injoin what had been already done; and the following order was made:—

The defendants, by their counsel, undertaking not to pay or apply any further monies belonging to the Company in or towards payment of the expenses already incurred, or to be hereafter incurred, in promoting the said bill in Parliament, with a view to improve the navigation of the river Dee, without the leave of the Court; and the plaintiff, by his counsel, undertaking to withdraw the notices given by him to the committee for promoting the bill and the bankers of such committee, without prejudice to any question—the motion was ordered to stand over.

The effect of the affidavits and the arguments are sufficiently stated or referred to in the judgment.

Mr. Turner, Mr. Roupell, and Mr. Speed cited *Colman v. The Eastern Counties Railway Company* (a), *Cohen v. Wilkinson* (b), and *The Attorney-General v. The Corporation of Norwich* (c).

Mr. Malins and Mr. Giffard, contra, cited *Bright v. North* (d), and *The King v. The Commissioners of Sewers for the Tower Hamlets* (e).

Mr. Turner, in reply, shewed that the defendants had been made aware of the illegality of their proceedings by the statement of the opinion of the solicitor of the Company in answer to a question put at the meeting of February, 1850.

The MASTER OF THE ROLLS.—It appears that this Company was first established for the construction of a railway

(a) Ante, Vol. 4, p. 513.

2 My. & Cr. 406.

(b) Ante, Vol. 5, p. 741.

(d) 2 Ph. 216.

(c) 16 Sim. 225; 1 Keen, 700;

(e) 1 B. & Ad. 232.

only; but it being important to make it serve as an outlet for the minerals produced in the district through which it passed, a branch was brought down to the banks of the river Dee. At that place the Company was authorised to erect extensive wharfs and warehouses, and it then became not only a Railway Company, but also a company for erecting wharfs and warehouses. It must have been foreseen that the Company might have a very extensive business on these wharfs and within these warehouses; and it could not fail, therefore, to be known to everybody concerned in this Company, that they were materially interested in the navigation of the river Dee, on the banks of which the wharfs and warehouses were to be erected. The state of the navigation must have been known; and it must, I think, be assumed that the railway wharfs and warehouses were constructed with reference to the known existing state of the river, and on the supposition that the river and its navigation were then in such a state as to enable this Company to make a profitable use of its railway wharfs and warehouses; for, if it had been thought necessary to improve it for the purpose of this railway, there seems no reason why powers to contribute towards that improvement should not have been inserted in these Acts of Parliament in the same way as the powers for the construction of wharfs and warehouses. It is perfectly clear that nothing of the kind was contemplated by these Acts of Parliament, which not only contain no authority to employ the railway funds in improving that navigation, but, according to the passages last read, seem totally to exclude any such notion.

It turns out, that the navigation is not only worse than in former times, but is in a deteriorating state; so much so, that a report has been made upon a Government commission, that in time it is likely to be choked up, unless effectual means be taken to prevent it. This information was important to the Company, whose prosperity must depend probably in a material degree on the navigation of the river

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Dee being kept in a good state. It was, therefore, natural enough for them to wish not only that the navigation should be prevented from deteriorating, but, if possible, that it should be improved. I do not, therefore, in the least doubt, that, if there were funds legally applicable to the purpose, and if the navigation could not be improved, or its deterioration be prevented without the application of those funds, it would be very advantageous to this Company, and might be a most profitable and useful application of those funds, to apply them in improving the navigation of the river.

But, there being no powers in the Act of Parliament which extend to this matter, the question is, whether the Company, who have those funds only for the particular purposes prescribed by the Act of Parliament, have a right to apply them to any other purpose whatever.

I think it has been absolutely and now unalterably decided in the Court of Chancery, that Companies who are possessed of funds for objects which are distinctly defined by Act of Parliament cannot be allowed to apply them to any other purpose whatever, however advantageous or profitable that purpose may appear to be to the Company, or to the individual members of the Company.

An argument has been used, in which I confess I cannot concur: it is said, that the Company finds itself day by day getting worse—that, if they do not take some means to stop the mischief, it will proceed to such an extent, that their profits will be wholly cut off, and that therefore an interference by any desirable or proper means to prevent such a deterioration of the property is the same in principle as a resistance to an active encroachment, from which by law the directors are justified in defending the Company. It is said, that, if the Company are allowed to resist an encroachment on their property, they would in like manner be permitted to take such measures as have been here adopted to prevent its deterioration. I do not think there

is any analogy between the two cases. If, taking the law as it stands, and without applying for any new law, an offence is committed, or an encroachment is made upon their right or property, the Company are bound, on the principle of self defence, to take the proper means to resist it; but, taking steps to make an alteration in the law, merely on the ground that it will be beneficial to the Company, is a very different thing. The law, as it stands, *ex concessis*, does not allow the Company to protect themselves from this deterioration, or at least to protect themselves in such a way as would be beneficial to them; and the argument has been, that the expense would be so enormous that they could not do it under the powers of their present Act, that is, they are not allowed by law to do it; and, because the law in its present state does not enable them with their present funds, the directors are therefore to employ the funds of the Company in procuring a new law, which will give them authority to do it. There is really no analogy whatever between the two cases. I entirely concur in the decision of the Vice-Chancellor of England, who, in the case of the Corporation of Norwich, would not allow that to be done. I take it, that you may resist an encroachment, but that you must not apply the funds of the Company in obtaining a new law, on the speculation that it may be profitable to the Company. This appears to me the sound view of the case.

It is said, however, that this is no speculation.—Is it no speculation to employ money in the hope of procuring an Act of Parliament, which, if the Act does not pass, will be wholly and entirely thrown away? It is without doubt a mere speculation. I allow, that, if the object be effected, there may be a profit gained on the whole by the monies laid out; but suppose the directors expend 2000*l.* or 3000*l.*, and, after all, the bill cannot, or, for anything the Court knows to the contrary, ought not to pass into an Act,—or suppose it passes, but its operation is limited

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to that which might have be-
 lieved, or at one tenth part
 to consider, that the laying
 hazardous adventure of that
 tainly cannot do so.

I am clearly of opinion that
 funds of the Railway Company
 by their Act of Parliament;
 company and directors ought not
 any further sums of money.

As to the 2000*l.*, I make
 out of the jurisdiction of the
 was made, otherwise the in-
 the whole. I give no costs.

The order was in the follow-

July 1834.

ORDERED "That an injunction
 issue, (the directors, nominating
 bill in Parliament, in the plaintiff's
 any and improvement of the
 Shrewsbury and Chester Rail-
 any of the monies or funds the
 applying any of the monies or fi-
 in or towards payment of any
 after to be incurred, in and ab-
 promotion of the said bill in
 thereon, and from taking any sta-
 name or on account of the said
 improve the navigation of the
 order; without prejudice to any
 the plaintiff's bill mentioned,
 promoting the said bill in Parlia-

MEMORANDA.

IN the Vacation after Trinity Term, 1850, Sir *Lancelot Shadwell*, Vice-Chancellor of England, died. Sir *Robert Monsey Rolfe*, Knt., then a Baron of the Exchequer, was appointed Vice-Chancellor, and created a Peer by the title of Baron *Cranworth*, of Cranworth, in the county of Norfolk.

In the Vacation after Hilary Term, 1851, Lord *Langdale*, the Master of the Rolls, died; and in March, 1851, Sir *John Romilly*, then Attorney-General, was appointed in his place; Sir *A. J. E. Cockburn*, Solicitor-General, being appointed Attorney-General; and *William Page Wood*, Esq., one of her Majesty's counsel, being appointed Solicitor-General, thereupon received the honour of knighthood.

In the Vacation after Trinity Term, Vice-Chancellor the Right Hon. Sir *J. L. Knight Bruce*, and Vice-Chancellor the Right Hon. Lord *Cranworth*, were appointed Lords Justices in the Court of Chancery; and *George J. Turner*, *Richard Torin Kindersley*, and *James Parker*, Esquires and Q. C., were appointed Vice-Chancellors and Members of her Majesty's Privy Council, and thereupon received the honour of knighthood.

In Hilary Term, 1852, Sir *John Patteson*, one of the Judges of the Queen's Bench, having resigned, *Charles Crompton*, Esq., barrister-at-law, was appointed a Judge of that Court, and thereupon received the honour of knighthood.

In the month of February, 1852, Lord *Truro* resigned the Great Seal, which was delivered to Sir *E. Burtenshaw Sugden*, who was thereupon created a Peer by the title of Baron *St. Leonards*, of Slaugham, in the county of Sussex. Sir *A. J. E. Cockburn* and Sir *W. Page Wood*, having at the

same time resigned their respective offices of Solicitor and Attorney General, were succeeded by Sir *Frederick Thesiger* and Sir *Fitzroy Kelly*.

In the Vacation after Trinity Term, 1852, Sir *James Parker*, Vice-Chancellor, died, and *John Stuart*, Esq., Q.C., was appointed Vice-Chancellor and Member of her Majesty's Privy Council, and thereupon received the honour of knighthood.

In the Vacation after Michaelmas Term, 1852, Lord *St Leonards* resigned the Great Seal, which was thereupon delivered to the Right Hon. Lord Justice *Cranworth*; and his Lordship was succeeded in the office of Lord Justice by the Right Hon. Sir *G. J. Turner*, Vice-Chancellor. Sir *A. Thesiger* and Sir *F. Kelly* at the same time resigned their respective offices of Attorney and Solicitor-General, and Sir *A. J. E. Cockburn* and Sir *W. Page Wood* were re-appointed.

In Hilary Term, 1853, Sir *W. Page Wood* was appointed a Vice-Chancellor, in the room of the Right Hon. Sir *G. J. Turner*; and *Richard Bethell*, Esq., Q. C., was appointed Solicitor-General, and thereupon received the honour of knighthood.

In the Vacation after Hilary Term, 1854, Mr. Justice *Talfourd* died, and *R. B. Crowder*, Esq., one of her Majesty's counsel, was appointed a Judge of the Common Pleas, and thereupon received the honour of knighthood.

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TO THE

PRINCIPAL MATTERS.

••• *The Cases in Chancery are distinguished by the letters Ch.*

ABANDONMENT OF PART OF RAILWAY.

1. A bill was filed by a shareholder in a Railway Company, on behalf of himself and all other shareholders, except the defendants, the directors, to restrain the directors from raising money by calls or loans, for the carrying on works with a view to the completion of a part only of the line. There were several classes of shareholders in the Company, some of whom assented to, and others dissented from, the partial completion of the line. To this bill the directors demurred for want of equity and for want of parties:—*Held*, that the partial completion of the line was not within the powers of the Company; and

That the plaintiff could properly file a bill, on behalf of himself and of all other shareholders, to stay illegal proceedings by the directors; and that the several classes need not to be separately represented. Demurrers overruled. *Dumvile v. The Birkenhead, Lancashire, and Cheshire Junction R. Co.*—Ch. 932

2. On the 4th of May, 1850, a shareholder in a Railway Company filed a bill on behalf of himself and all other shareholders, except the defendants, the directors of the Com-

pany, to restrain the directors from raising money by calls or loans for the carrying on of works with the view to the completion of a part only of the line. The plaintiff moved for an injunction. The Master of the Rolls granted the injunction, on the ground that the carrying on of works and raising of money for the completion of a part only of a railway was illegal.

The Lord Chancellor admitted the principle of the decision of the Master of the Rolls, but dissolved the injunction, on the ground of acquiescence and delay in applying to the Court on the part of the plaintiff. *Graham v. The Birkenhead, Lancashire, and Cheshire Junction R. Co.*—Ch. 938

3. By three several Acts of Parliament three distinct lines of railway were authorised to be made by the same Company, and a specified amount of capital was directed to be raised under each Act, but it was declared that such capital should form the general capital of the Company. By a subsequent Act, the said Company, on completion of the railways, were bound to grant, and the L. & N. Company to accept, a lease in perpetuity of the three railways; and for the removal of doubts the Company authorised by the three several Acts

to form the three lines of railway, was declared to be one Company. The directors determined to abandon two out of the three lines, and were enforcing calls in order to complete the third, when the plaintiff filed his bill, praying an injunction to restrain the completion of one line only, and from enforcing calls for that purpose. To this bill the defendants demurred for want of equity, and for want of parties.

The Master of the Rolls expressed his opinion in favour of the bill, but ultimately allowed the demurrer, on the ground that the bill contained no allegation that the directors were about to apply the funds of the Company to the construction of the one line only, with liberty to amend. The plaintiff amended accordingly, and applied for an injunction, which the Master of the Rolls granted.

The Lords Justices dissolved the injunction;—the Lord Justice *Knight Bruce*, on the grounds, that the railway being in actual operation, the terms of the injunction were too stringent, that the L. & N. Company ought to be parties to the bill, and that the plaintiff had acquiesced in the expenditure; and the Lord Justice Lord *Cranworth*, on the ground, that, although the three lines formed, in his opinion, one undertaking, which the Company were bound to complete, the Court would rightly exercise its discretion as to granting an injunction, on an interlocutory application, in the present case, by discharging the order. *Hodgson v. Earl Powis*—Ch. 956

4. An information was filed at the relation of the corporation of S., praying that a Railway Company might be restrained from proceeding with the construction of or opening a railway from A. to B., without proceeding with and opening a diverging line to S., or until they had

given notice to the landowners of the S. line to treat for and purchase the land required for the S. line. No specific relief was prayed. A general demurrer to the information was allowed by

The Vice-Chancellor *Knight Bruce* holding, on the grounds, that no injury was shewn to result to the public by the partial opening of the line, that the proceeding by writ of mandamus was open to the public, and that the probability of no writ of mandamus issuing before the expiration of the Company's powers, did not constitute an equity. And by

The Lord Chancellor, on the ground, that no sufficient cause had been shewn for the interference of the Court on the application of the Attorney-General. *The Attorney-General v. The Birmingham, &c. R. Co.*—Ch. 972

ACQUIESCENCE.

See ABANDONMENT, 2, 3.

ACTION.

See RAILWAYS CLAUSES CONSOLIDATION ACT.

1. The plaintiff, an engineer, was employed by the provisional committee of a projected Railway Company; and, at a meeting of that committee, the plaintiff being present, a resolution was passed "That the provisional committee disclaim the intention of taking on themselves any personal responsibility as regards the expenses incurred or to be incurred in or about the Company, and that no such responsibility shall attach to them."—"That it be a recommendation to the committee of management to endeavour to secure the services of J. L. and Col. L. (the plaintiff), it being clearly understood that neither of those gentlemen shall have any personal claim against any

member of the provisional committee." Subsequently, at another meeting, the plaintiff being also present, it was resolved that Messrs. L. be requested to forward the survey, "Col. L. (the plaintiff) stating that he would make no claim for his personal services until there should be sufficient funds of the Company to meet any demand he might be entitled to make." In answer to a letter from the secretary, the plaintiff wrote:—"I never understood, that, unless the project were successful, the engineers were to abandon all claim; but I did understand that the individuals comprising the committee were not to be held personally liable." Afterwards, at a meeting of the committee, it was resolved, "that the committee bind themselves to be answerable to the extent of 1000*l.*, to be applied to engineering and surveying purposes." Deposits to the amount of 4168*l.* were received by the committee, but were returned to the shareholders, the scheme having been abandoned in consequence of an arrangement with another Company. In an action by the plaintiff against one of the provisional committee for services performed in promoting the undertaking:—*Held*, that he was not liable, the plaintiff having undertaken to do the work not upon a contract with the provisional committee, but on the chance of the scheme succeeding and there being funds available for the payment of his claim, which there were not. *Landman v. Entwistle*, 472

2. A corporation agreed by parol to take, and occupied, premises for a year; they did so occupy and also for another year, at the end of which period they removed their goods without any previous notice, having paid a quarter of the current year's rent:—*Held*, that they were not

liable for the remainder of the year's rent, not having occupied the premises, and the contract arising by payment of rent not being binding on the corporation.—*Semble*, that, if the plaintiff had, by deed, demised the premises to the defendants as tenants from year to year, and they had accepted the tenancy, that would have created such an interest as would have rendered the defendants liable. *Finlay v. The Bristol and Exeter R. Co.* 449

3. An action of assumpsit for use and occupation lies against a corporation, where there has been an actual occupation by the corporation, though they have not contracted under seal; and where a Railway Company have occupied, in the absence of any negative evidence, the Court will presume that they occupied under such a parol contract as the directors are by 8 & 9 Vict. c. 16, s. 97, empowered to enter into. *Lowe v. The London and North Western R. Co.*, 524

4. The plaintiff was the owner of a close adjoining a close which was the property of the Great Northern Railway Company, and by a defect in his fences his sheep strayed on their close, and by a defect in the defendants' fences they got on the defendants' Railway, and were there killed:—*Held*, that, although the Great Northern Railway Company would be entitled, in such a case, to maintain an action for an injury done to their cattle straying from their close, yet, that the plaintiff was not so entitled, either at common law or under 8 Vict. c. 20, s. 68. *Ricketts v. The East and West India Docks and Birmingham Junction R. Co.* 295

AGENT.

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CARRIER, 3.

CONTRACT, 4.

AGREEMENT.

See COMPANY.
CONTRACT.
TOLLS.

1. A Railway Company agreed with a landowner to purchase so much of his land as they required for their railway at a certain sum, "subject to the making of such roads, ways, and slips for cattle as might be necessary."

The railway severed a portion of the plaintiff's land, and the Company made a crossing on the level, and a cattle creep under their line.

The plaintiff, not content with these communications, filed his bill, contending that he was entitled to a bridge over the railway, and to another crossing also. On the hearing of the cause, *held*, by the Master of the Rolls, and decree confirmed by Lord Chancellor, that the Court had jurisdiction to provide for the specific performance of such an agreement under the direction of the Court, and directed a reference to the Master. *Sanderson v. The Cockermouth & c. R. Co.*—Ch. 613

2. The Oxford Railway Company, previously to obtaining their Act, entered into a provisional agreement with the Great Western Railway Company, under which it was agreed (among other things) that that Company should assist the Oxford Company in obtaining an Act; and that such Act should contain a power to lease their proposed line to the Great Western Railway Company. The bill passed into an Act, containing powers to lease and sell the new line to the Great Western Railway Company, and under it the Railway was to be made in all respects to the satisfaction of the engineer of that Company, and to be formed of such gauge as to admit of its being worked continuously with the Great

Western line. No agreement was finally concluded between the Companies; but, pending negotiations, some of the directors of the new Company entered into an agreement with the London and North Western Railway Company (which received the sanction of the majority of the shareholders, and was executed under the corporate seals of both Companies), a term in which was as follows:—"The whole concern, without incumbrance, when completed, to be worked by the London and North Western and Midland Counties Railway Companies, who shall have perfect control and exercise all the rights of the Oxford Railway Company;" and another term was, that the Oxford Railway was to be completed as a narrow gauge double line between certain places therein specified. Some of the shareholders of the Oxford Railway Company being dissatisfied with the agreement entered into with the London and North Western Railway Company, filed a bill to restrain that Company, by injunction, from acting under that agreement, or using the funds of the Company in applying to Parliament to sanction it:—*Held*, that the Oxford Railway Company be enjoined from carrying into effect so much of the agreement as bound them to lay down any part of the line on the narrow gauge.

Held, that the Court will interfere by injunction to restrain Companies from applying any portion of their funds in a way not authorised by their Acts. That, although the Oxford Railway was to be made so as to be traversed continuously by the Great Western Railway Company, the Oxford Railway Company were not thereby prevented from making a line of a mixed gauge or narrow gauge beside it independent-

ly; but that they could not do so under the terms of an illegal agreement.

That an agreement by one Company to delegate its powers to another Company is illegal.

That one dissentient shareholder may file a bill to restrain an illegal proceeding by the Company, although such proceeding may have been sanctioned by a large majority of the shareholders.

Semble, that a Court of equity will not interfere by injunction to restrain the execution of an agreement involving a question of law, unless it appear that irreparable injury would result from non-interference. *Beman v. Rufford*—Ch. 48

3. In order to induce the plaintiff to withdraw his opposition to a bill in Parliament, H. and Y., on behalf of a projected Railway Company, entered into an agreement with him that he should assent to the Railway being made through his property in the manner laid down in the deposited plans, and that the Company should, in case they obtained an Act of incorporation in the then present or any subsequent session, pay to the plaintiff 1000*l.* for all lands required by the Company for the making of the Railway, and a further sum of 4000*l.* for residential injury. That the Company should construct a tunnel in manner therein mentioned; and that the Company should cause a station to be made at the village F., with all proper approaches, the land required for such station and approaches to be furnished by the plaintiff. The agreement was signed by H. and Y., and the plaintiff withdrew his opposition. The Company were duly incorporated, but, having abandoned the undertaking, the plaintiff filed his bill for specific performance of the contract.

To this bill, the defendants demurred.

The defendants having exercised an option given to them by the Court, of taking a case for the opinion of a Court of law, the order of the Court was suspended until that opinion had been obtained. *Preston v. The Liverpool &c. R. Co.*—Ch. 1

Held, on the hearing, that the incorporated Company had not adopted or taken the benefit of the agreement, so as to bind themselves equitably to perform it. That, although a Company cannot legally bind itself except by deed under the corporate seal, yet it may equitably bind itself by adoption, or by perception of a benefit under a contract. *S. C.*—Ch. 704

4. The promoters of a projected Railway Company, previously to obtaining their Act, entered into an agreement with A. to pay him 4500*l.* for a portion of his land, not exceeding eight acres, and for consequential damage; and A. agreed to withdraw his opposition to the bill. The projected Company, having been incorporated by Act of Parliament, confirmed the agreement by indenture under their seal. The Railway was afterwards abandoned, and the powers of the Company to take land compulsorily ceased. No part of A.'s land having been taken or being required for the Railway, he filed his claim for specific performance of the agreement:—*Held*, by the Lords Justices, overruling the decision of the Vice-Chancellor *Turner*, that, the claimant having the ready means of obtaining complete redress at law, his claim be dismissed, without prejudice to his rights in an action at law. *Webb v. The Direct London and Portsmouth R. Co.*—Ch. 9

5. An incorporated Railway Company applied to Parliament for an Act to enable them to make a branch line. A landowner, A., through whose property the proposed Rail-

way would, according to the deposited plans and sections, pass, opposed the bill in Parliament; whereupon the Railway Company entered into negotiations with him, which resulted in certain heads of agreement being drawn up and signed by agents on behalf of both parties, and A.'s withdrawal of his opposition. The bill passed into an Act in 1847; and soon afterwards, A. tendered a formal agreement to the Company for their execution. A. died in March, 1848, leaving the plaintiffs his devisees in trust. The Railway Company, in the same year, declared their intention of abandoning their scheme for making the branch line; and, after repeated applications, returned the draft agreement, altered so as to make the taking of A.'s land conditional on the formation of the Railway. Nothing further was done; and on the 18th of June, 1850, the plaintiffs filed their claim for specific performance of the heads of agreement. On the 9th of July, in the same year, the powers of the Company to take land compulsorily ceased. The Master of the Rolls *held*, that the plaintiffs were entitled to specific performance of the heads of agreement entered into before the passing of the Act, notwithstanding the plaintiffs had delayed filing their claim for eighteen months after the defendants' agreement had been returned and the scheme abandoned. The Lords Justices, on appeal, following their decision in *Webb v. The Direct London and Portsmouth R. Co.*, reversed the decision of the Court below, *holding*, that it was not a case for specific performance, on the grounds, that complete relief could be obtained at law, and that there existed no mutuality in the contract; that, independently of these grounds, the laches of the plaintiffs in filing their claim, public

policy, and the vagueness of the terms of the contract, prevented the Court from decreeing specific performance. *Lord James Stuart v. The London and North Western R. Co.*—Ch. 25

6. By a memorandum of agreement under the corporate seal of a Railway Company, who were the promoters of a bill in Parliament for a branch line from their Railway to Spalding, with an extension to form a junction with the Ambergate Railway, the Company agreed, conditionally on the bill passing, to purchase the whole of the plaintiff's lands, of part of which he was owner in fee simple, and of the other part only tenant for life, and to obtain all necessary powers for enabling them to complete the purchase. One third only of the plaintiff's land was within the limits of deviation, and directly affected by the bill in Parliament. The objects of the agreement were, to induce the plaintiff to withdraw his opposition to the bill, and also to enable the Company to form, independently of Parliament, by means of a diverging line passing through a part of his lands not included in the deposited plans, a junction with the Ambergate Railway, in the event of the extension proposed by the Company's bill being rejected by Parliament. There was nothing in the agreement or evidence to shew that the plaintiff knew of the latter object of the Company.

The bill passed into an Act, with a clause prohibiting the formation of the extension line, but giving the Company power to purchase land, not exceeding thirty acres, for extraordinary purposes. The Company afterwards abandoned the whole of the proposed undertaking, and declined to perform the contract, whereupon the plaintiff filed his bill. The Vice-Chancellor decreed spe-

cific performance of the contract, and directed a reference to the Master as to the plaintiff's title. The Master, by his report, having approved the title, the defendants took exceptions to the report, which were overruled by the Vice-Chancellor. The Lord Chancellor, on appeal, affirmed the decisions of the Court below on the hearing and exceptions.

Held, that an incorporated Railway Company, acting as the promoters of a bill for the extension of their line, are competent to bind themselves by contract with a landowner, conditionally on the Act passing, for the purchase of the whole of his property, although a portion only of it was directly affected by the bill.

A Company cannot release itself from contracts so entered into by impediments of their own creating, such as allowing the powers for the compulsory purchase of land or the completion of the Railway to expire, or omitting to pursue the forms prescribed by the Lands Clauses Consolidation Act, or upon any grounds of supposed illegality in the contract, of which the landowner is not shewn to be conusant. *Hawkes v. The Eastern Counties R. Co.*—Ch. 188

7. An incorporated Railway Company promoted a bill in Parliament, to obtain powers to make an extension line. A landowner opposed, but withdrew his opposition in consequence of an agreement to purchase his land, entered into and executed by a person, the solicitor of the Company, who professed to act as their agent. The agreement was not under the seal of the Company, and the person executing it had not been legally authorised by the Company to do so. The bill passed into an Act, but the construction of the Railway was not proceeded with

before the expiration of the compulsory powers of the Company. The time for the completion of the Railway had not expired when the plaintiff filed his bill against the Company for specific performance of the agreement:—*Held*, that, in the absence of any proof of the adoption of the agreement by the Company, or of their having received any benefit under it, the plaintiff was not entitled to a decree for specific performance, and that the Company were not compellable to admit the contract in an action at law for damages. *Goody v. The Colchester and Stour Valley R. Co.*—Ch. 375

8. An agreement between two Railway Companies, involving a delegation or transfer from one to the other, of any of the duties or powers exclusively given to either of them, is invalid and against public policy.

The 87th section of the Railways Clauses Consolidation Act gives a limited power to a Railway Company to run over a line belonging to another Company, for the purposes of their own traffic only.

An agreement to apply to Parliament, or an agreement not to be acted on until necessary powers have been obtained, is legal, and one with the execution of which the Court will not interfere.

An application to restrain the Company from affixing their seal to an illegal agreement, refused.

Where the object is to restrain the execution of an illegal agreement, a bill filed by one shareholder on behalf of himself and all other shareholders against the Company, is rightly framed, and the officers of the Company need not be individually parties. *Winch v. The Birkenhead, &c. R. Cos.*—Ch. 384

9. One Railway Company entered into the following agreement with

another Railway Company :—" The Great Northern Railway Company to give the following terms, bearing harmless the Ambergate Railway Company against all liabilities, whether of canals or otherwise. The Great Northern Railway Company, until an Act of Parliament can be obtained, to work the traffic of the Ambergate Railway Company from the 1st of July next, and to pay to the Ambergate Railway Company such tolls as will, after answering all expenses and liabilities, furnish a dividend of 4*l.* per cent. on the paid-up share capital of the Ambergate Railway Company ; and, as soon as an Act of Parliament can be obtained, will guarantee a dividend of 4*l.* per cent. on such capital. The Great Northern Railway Company to apply, at their own expense, for an Act of Parliament to ratify such arrangement ; and, in case such Act is not obtained in the first session, the application to be renewed, always at the expense of the Great Northern Railway Company, unless the same be lost by the default of the Ambergate Railway Company. The Great Northern Railway Company to have the privilege of paying off the shareholders at par, on giving six months' notice at any time after the obtaining of the Act. No further call to be made on the Ambergate shares."

This agreement had been approved at a general meeting of one of the Companies, but, before it was submitted to the meeting of the Great Northern Railway Company, one of the shareholders filed a bill praying an injunction to restrain the Company from proceeding with it :—*Held*, that the 87th section of the Railways Clauses Consolidation Act gives one Railway Company a right to contract for passing over the line of another Company, and to stop,

and take up and carry passengers and goods upon that line, but not to acquire the trade of the Company over whose line they have agreed to pass.

That an agreement "to pay such an amount as would, after answering all expenses and liabilities, furnish a dividend of 4*l.* per cent.," is not an agreement to pay "toll" within the meaning of the Act.

That, if one shareholder dissent, the funds of a Company are not applicable to the purpose of applying to Parliament for powers to enter into any undertaking not forming part of the original objects for which the Company was incorporated. *Simpson v. Denison*—Ch.

403

10. Two Railway Companies, N. and S. (the defendants), solicited a bill in Parliament to authorise the N. Company to take a lease of the undertaking of the S. Company, which consisted of three distinct lines of railway. The plaintiffs opposed the bill ; but an agreement having been entered into between the three Companies, the plaintiffs withdrew their opposition, and the bill passed into an Act, empowering and requiring the S. Company to grant to the N. Company, and the N. Company to accept, a lease in perpetuity of all the S. Company's undertaking. An agreement under the corporate seals of the three Companies was then executed ; and by the first clause the Companies N. and S. undertook, during the continuance of the lease, to keep an account of the traffic from Shrewsbury and Wellington to Rugby or any place to the south. By the second clause, they undertook to furnish the plaintiffs with half-yearly accounts of these matters. By the third clause, they undertook not to convey anything from Shrewsbury

or Wellington, or from any point between those two places, to any point on the line of the plaintiffs' railway or the Stour Valley Railway, or to use the line by Gnosal and Stafford to compete for any traffic which properly belonged to the plaintiffs. By the fourth clause, it was stipulated that the contract should not be evaded by any device, and that any questions arising from it should be referred to the arbitration of R. S. And by the fifth clause, the plaintiffs were to have liberty to determine the agreement by a six months notice. One line only of the three railways projected by the S. Company was completed, and no lease was executed pursuant to the Act; the defendants contending that the time for granting a lease had not arrived until the completion of the three lines. The plaintiffs opened their line of railway in 1849, and applied to the defendants to fulfil the terms of the agreement; which application not being acceded to, the plaintiffs filed their bill for specific performance, and praying an injunction to restrain the defendants from carrying passengers, cattle, or goods between the specified points, and from using their railway between Gnosal and Stafford to compete with the plaintiffs' traffic. Demurrers were put in to this bill, and allowed by the Vice-Chancellor. Lord *Cottenham*, L. C., reversed that decision; whereupon the Vice-Chancellor granted an injunction. Lord *Truro*, L. C., on motion after answer, discharged the injunction granted by the Vice-Chancellor, with liberty to the plaintiffs to bring such action as they might be advised, both parties undertaking to keep all the required accounts. An action was brought by the plaintiffs in the Court of Queen's Bench; the declaration was

demurred to, and the demurrers were upon argument overruled. The cause then came on for hearing before the *Master of the Rolls*, who dismissed the bill, and refused to make any order upon a renewed motion for an injunction. *The Lords Justices* on appeal confirmed the order of the Master of the Rolls, and dismissed the bill, but without costs.

Held, by the *Vice-Chancellor*, that, no lease of the undertaking having been executed, the agreement had not come into operation.

Held by Lord *Cottenham*, L. C., that the time for granting a lease of each distinct line arose upon the completion of each line, and that the agreement was binding.

Held by Lord *Truro*, L. C., that the injunction, granted in aid of an alleged legal right before the hearing, not being required for the protection of the plaintiffs against irremediable mischief, be discharged; with liberty to bring an action.

Held by the *Court of Queen's Bench*, that the agreement was not void at law.

Held by the *Master of the Rolls* on the hearing, that the time when the agreement was to come into operation had not arrived, and that the bill be dismissed.

Held by Knight *Bruce*, L. J., on appeal, that, independently of the Leasing Act, the agreement was beyond the powers of the directors, and a breach of trust as between them and their shareholders.

Held by *Turner*, L. J., that the time for granting a lease of one line of the three Shropshire Union Railways arrived on the completion of that line; but that the agreement was beyond the powers of the contracting parties, and could not be enforced by a Court of equity. *The Shrewsbury and Birmingham R. Co. v. The London and North Western R. Co., &c.*—Ch.

11. The Company (plaintiffs) entered into an agreement with the Company (defendants), whereby the plaintiffs were to have the right of using certain portions of the defendants' railway, and their stations, conveniences, &c. The plaintiffs afterwards entered into an agreement with the East Anglian Railway Company, whereby the latter Company, without legislative sanction, delegated for a term all their rights over their railway, &c., to the plaintiffs. The defendants being prejudiced by the latter agreement, obstructed the plaintiffs in the use of that portion of their line, which was connected with the East Anglian Railway, thereby depriving the plaintiffs of the benefit of their agreement.

The plaintiffs filed their bill, and moved for an injunction to restrain the defendants from obstructing the passage of the plaintiffs over their line:—*Held*, that the agreement between the plaintiffs and the East Anglian Railway Company was in itself illegal; and that the Court would not interfere in cases where the effect of its interference would be to extend and facilitate the objects of an illegal agreement.

That, where Railway Companies have entered into agreements as to passing over each other's lines, the rights of the parties must depend on the terms of the agreement, and can no longer be governed by the provisions of the Railways Clauses Consolidation Act. *The Great Northern R. Co. v. The Eastern Counties R. Co.*—Ch. 643

ARBITRATION.

1. A tenant for life refused a sum of money offered by a Railway Company as the value of lands taken for the purposes of their Act, and required the amount to be settled by arbitration. The umpire awarded

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BILL

See F

BOND.

1. The defendant executed, as surety, a bond to a Railway Company, conditional for the faithful discharge by H. C. of his duties as clerk, so long as he should continue in the service of the Company. Whilst H. C. continued in such service, that Company and another Railway Company were dissolved and united into one Company by an Act of Parliament, which enacted, that "all bonds, &c., made or entered into before the union, with, in favour of, or by or for either of the dissolved Companies, should be and remain as good, valid, and effectual, in favour of and against, and with reference to the new Company, and might be proceeded on and enforced in the same manner, to all intents and purposes, as if the new Company had been a party to and executed the same, or had been named or referred to therein, instead of the persons, Company, or party actually named therein;" and also, that "every clerk, &c. who was in the service of either of the dissolved Companies at their union, should, immediately after it, hold and enjoy his office and employment with the salary thereunto annexed, until he should be removed therefrom by the new Company." H. C. accordingly remained in the employ of the new Company:—*Held*, that the defendant was liable to the new Company for a breach of the bond committed by H. C. after the union. *Eastern Union R. Co. v. Cochrane*, 792

2. By 6 & 7 Will. 4, c. cxii., a Company was empowered to borrow money by bond, payable in such manner and at such times as they might think proper; and it was enacted, that all persons to whom any such security should be given, should be equally entitled to a claim

or lien on the rents, rates, tolls, and profits, in proportion to the respective sums mentioned thereby to be secured, and without any preference by reason of the priority of date of any such securities, or on any other account. The Company gave to the plaintiff a common money bond:—*Held*, that an action lay on such bond, notwithstanding the above provision.

Whether effect would be given to the above clause, forbidding a preference, in restraining execution—*Quære. Bolckow v. The Herne Bay Pier Co.*, 231

BROKERAGE.

Brokerage in respect of an investment of purchase money in Court, ordered, with consent of petitioner, to be paid by her, and to be repaid to her by a Railway Company. *Re The Kendal and Westmoreland Railway Act—Ch.* 901

CALLS.

See SHARES.

1. The defendant applied for and obtained an allotment of shares in a Joint-stock Company, completely registered under the 7 & 8 Vict. c. 110, the capital of which was to consist of 500,000*l.*, in 50,000 shares. He paid the deposit, and his name was inserted in the register of shareholders, but he never executed the deed of settlement, or any deed referring to it. The proposed capital was never subscribed, but the Company commenced business with less; and, not succeeding, an Act of Parliament passed for winding up the concern; which, after reciting the deed of settlement, that the proposed capital had not been subscribed, and that all the subscribed capital had not been paid up, empowered the directors to sue for

calls, enacted, that, in such actions, the register should be *prima facie* evidence of the defendant being a shareholder, and of the number of his shares, provided that such calls should be made according to the provisions of the deed of settlement, and, as regarded the liability of shareholders, should be deemed to have been made under such provisions; and that nothing in that Act contained, except as therein expressly enacted, should render liable to calls any shareholder or other person who would not have been liable thereto if that Act had not passed. The defendant having been sued for calls:—*Held*, first, that though there was a *prima facie* case against the defendant of his being a shareholder, his name being on the register, yet that the *prima facie* case was rebutted, the private Act applying to *shareholders* only, and the defendant not being a shareholder within 7 & 8 Vict. c. 110, s. 30, as he had never executed the deed of settlement; Secondly, (*Martin, B.*, dubitante), that, even if the private Act extended to *subscribers*, the defendant was not liable, for his contract was conditional (provided the capital was subscribed for), and that condition had not been performed or waived. *The Galvanized Iron Co. v. Westoby*, 318

2. To an action for calls, a plea of infancy should allege a repudiation of the contract within a reasonable time after the defendant became of full age. *The Dublin and Wicklow R. Co. v. Black*, 434

3. The defendant, by letter, applied to the provisional committee of a Railway Company to allot to him one hundred shares in the proposed Company. In answer he received the following letter: "Sir,—The provisional committee having allotted to you fifty shares of 20l.

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Apps.

2. The defendants, a Railway Company, advertised themselves to carry parcels, &c. from London to Glasgow (though their own line ended at Preston), and habitually received, booked, and carried parcels of all descriptions from London to Glasgow (receiving prepayment for the whole distance), having made arrangements with the other Companies, by which the defendants' vans, being locked in London, were carried through from Preston to Glasgow, under the management and by the locomotive power of the other Companies.

The defendants had issued written orders to their servants, that "packed" parcels be invoiced to termini of the defendants' line only. The plaintiff had received notice of this order, but it had never been enforced against any one but the plaintiff, and the defendants had knowingly carried packed parcels from London to Glasgow since the order was issued; but they refused to carry a packed parcel for the plaintiff further than Preston:—*Held*, first, that, by the 8 & 9 Vict. c. 20, ss. 86, 87, and 89, the defendants were left in the position of common carriers; and that, having held themselves out, and acted, as common carriers from London to Glasgow, they were bound by the common law to receive and carry all goods tendered to them to be carried from London to Glasgow, although the latter place was out of England. Secondly, that, being common carriers, and having carried packed parcels for some persons, they were bound to carry them for all.

Seemle, that a common carrier cannot, in any case, refuse to carry "packed" parcels.

Held, also, that a common carrier has no right, in all cases, and under all circumstances, to demand what

are the contents of a parcel tendered to him to be carried, and cannot justify his refusal to carry, simply on the ground that information as to its contents was refused. *Crouch v. The London and North Western R. Co.*, 717

3. The plaintiff delivered at a station on the defendants' railway, a package, addressed "S. & Co., East India Docks, passenger ship Melbourne, Australia," and paid one sum for the carriage to London. By the practice of the defendants, goods delivered at that station for London are carried by their own line to Birmingham, and thence by the London and North Western Railway to London. Before the package reached London, the plaintiff gave the clerk at the London station of the London and North Western Railway Company an order (written across the receipt which had been given for the package) to send it to "S. & Co., Bell Wharf, Ratcliffe, London;" which order the clerk promised to obey, saying, there was no extra charge. The package was, however, delivered according to the first address, and consequently lost:—*Held*, that the defendants' contract was to deliver according to the plaintiff's directions; that the plaintiff had a right to countermand his original direction; that the clerk was the agent of the defendants to carry out their contract, and therefore to receive the countermand; and that the defendants were liable for the loss consequent on the countermand having been disobeyed. *Scothorn v. The South Staffordshire R. Co.*, 810

4. By the 14th section of the 13 & 14 Vict. c. lxi., the Great Northern Railway Company is empowered to demand for the carriage of small parcels any sum which they may think fit. The Railways Clauses Consolidation Act, 8 Vict. c. 20, is incorpo-

rated with the special Act ; and sect. 90, while it empowers a Company to vary the tolls upon their railway as they may think fit, provides, "that all such tolls be at all times charged equally to all persons, and after the same rate, in respect of all . . . goods of the same description, and conveyed by a like carriage passing only over the same portion of railway under the same circumstances, and no reduction or advance in any such tolls shall be made, either directly or indirectly, in favour of or against any particular Company or persons using the railway :—*Held*, that the Company were compelled to charge all persons alike ; and that, although they might charge for "packed parcels" at a higher rate than an ordinary package, they were not justified in charging a carrier more than the rest of the public. *Crouch v. The Great Northern R. Co.*, 787

5. The plaintiff took a horse to a station of the defendants, who were common carriers of horses, to be conveyed along their railway ; on paying for the carriage he received and signed the following ticket : "This ticket is issued subject to the owner undertaking to bear all the risk of injury by conveyance and other contingencies. The Company will not be responsible for any damages, however caused, to horses travelling on their railway or in their vehicles." The horse was injured by a collision on the railway from want of due care, but without any wilful misconduct or gross negligence on the part of the defendants' servants :—*Held*, that there was a special contract between the parties, which was valid under section 6 of the Carriers' Act, 11 Geo. 4 & 1 Will. 4, c. 68 ; and that the ticket was not a mere public notice within the 4th section of that Act ; and that by the terms of the contract

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power only, the defendants would not be responsible for any alleged defects in their carriages or trucks, unless complaint was made at the time of booking, or before the same left the station, nor for any damage, however caused, to horse, cattle, or live stock of any description travelling upon the said Railway, or in the defendants' vehicles :—*Held*, that this exemption applied to all risks of whatever kind, and however arising, to be encountered in the course of the journey, including the risk of a wheel taking fire owing to neglect to grease it, whether from "negligence," "gross negligence," or "culpable negligence." *Austin v. The Manchester, Sheffield, and Lincolnshire R. Co.*, 300

8. The declaration stated, that the defendants were the owners of a Railway, that the plaintiff delivered to the defendants a horse, to be carried by them for hire on their Railway from A. to B., subject to certain conditions assented to by the plaintiff, and contained in a notice at the foot of the ticket of the defendants, for the conveyance of the horse; which ticket stated that it was issued subject to the owner's taking all risks of conveyance whatsoever, as the Company would not be responsible for any injury or damage (howsoever caused) occurring to live stock travelling upon their line. It then alleged, that, whilst the horse was in the custody of the defendants, it was injured by the horse-box, in which it was, being propelled against some trucks, through the gross negligence of the Company :—*Held*, (*Platt*, B., dissentiente), that the declaration was bad in arrest of judgment; that the defendants had engaged to carry the horse under a special contract, the terms of which were contained in the notice, by which the plaintiff

had agreed that the defendants should not be responsible for any loss, although it were occasioned through their negligence. *Carr v. The Lancashire and Yorkshire R. Co.*, 426

9. On the delivery of goods by the plaintiff at Bristol to the defendants, he received from them a note, stating that the goods were to be conveyed by the Company as below, and on the conditions stated on the other side. Below was a statement that "Bristol" was the station from which, and "Paddington" the station to which, the goods were to be carried; and that the plaintiff's address was at "Brompton." One of the conditions at the back of the receipt stated, that goods addressed to consignees resident beyond the immediate vicinity of the Company's Goods Stations would be forwarded by public carrier or otherwise, as opportunity might offer; but that the delivery of the goods by the Company would be considered as complete, and the responsibility of the Company cease, when such carriers received the goods; and that the Company would not be responsible for loss or damage to goods beyond the limits of their railway. The plaintiff's goods were safely conveyed to the Paddington station, and there given to a person specially appointed by the Company for the collection and delivery of goods, and through his negligence were damaged on their delivery at Brompton. The defendants' charge included the carriage from Paddington to Brompton :—*Held*, that the contract of the defendants was to carry from Bristol to Paddington, and that they were not liable for the subsequent damage. *Fowles v. The Great Western R. Co.*, 421

COMPANIES CLAUSES CONSOLIDATION ACT.

See PLEADING.
SHARES.

An affidavit in support of an application under the Companies Clauses Consolidation Act, 1845, (8 Vict. c. 16, s. 36), for a sci. fi., in order to issue execution against F. as a shareholder of a Company, against which a judgment had been obtained, stated, that deponent "having been foiled in his attempts to obtain a sight of the registry, and so to obtain authentic and official information on the subject, instituted inquiries aliunde, as to who really were the shareholders of the Company; and deponent hath been credibly informed, by persons officially connected with the Railway, and which information deponent verily believes to be true, that the said F., who has been a director from the commencement, was a duly registered shareholder of seventy shares in the said Company; and that 1085*l.* was due thereon in respect of subscriptions not called up, the shares in the Company being 20*l.* shares, and only 4*l.* 10*s.* per share having been paid up or called:—"Held, that this affidavit shewed *prima facie* that F. was a shareholder, and, being unanswered, was sufficient. *Rastrick v. The Derbyshire, Staffordshire, and Worcester-shire Junction R. Co.*, 799

COMPANY.

A Company, incorporated by Act of Parliament, for making and maintaining a railway and works, was empowered to raise money to be applied in discharging the costs incurred in obtaining the Act, and the remainder towards making and maintaining the railway and works;

COMPULSORY POWERS

and the profits of the Company, after defraying the expenses of making, maintaining, and working the Railway, were to be divided amongst the proprietors. The Company, so incorporated, afterwards covenanted with the plaintiffs, a Railway Company, to take a lease of their line, and to find the capital necessary for the construction of the branches and works authorised to be constructed by bills then pending in Parliament, and to pay the costs of preparing and promoting such bills:—*Held*, that the defendants, having a limited authority only, and being a corporation only for the purpose of making and maintaining the Railway sanctioned by the Act, could only apply their funds for the purposes provided by the statute; and that such an agreement was illegal, though the object of it might have been the increase of the profit of their Railway. *The East Anglian R. Co. v. The Eastern Counties R. Co.*, 150

COMPENSATION.

See ARBITRATION.
LANDS CLAUSES CONSOLIDATION ACT.
REVERSIONER.

COMPLETION OF RAILWAY

See MANDAMUS.

COMPULSORY POWERS.

See AGREEMENT, 6.
EASEMENT.
MANDAMUS, 1.
MANUFACTORY.

A. sold a piece of land, and conveyed it to a Railway Company. After that the powers of the Company to take land compulsorily had ceased, W. claimed the piece of land conveyed by A., and filed his bill to

restrain the Company from keeping possession thereof. The affidavits did not shew a clear title in W.:—*Held*, by the Vice-Chancellor, that, in a case of disputed title, and in the absence of conclusive evidence of the right of the claimant, the Court will not interfere by injunction, but leave the party to his remedy at law. *Webster v. The South Eastern R. Co.*—Ch. 979

CONDITION.

See COVENANT.

CONTRACT.

See ACTION.

AGREEMENT.

1. One of the managing committee of the South Eastern Railway Company agreed with the managing committee of a proposed Railway Company, who required the authority of Parliament to make a line of railway, and who contemplated the abandonment of their objects, that, if they would not abandon their objects, and would hand over the scheme to the South Eastern Railway Company, in the event of an application to Parliament failing, the South Eastern Railway Company would insure the Company, of which the plaintiffs were the managing committee, against any loss which might be caused to the said Company by such rejection and failure, and would defray all expenses that should be incurred in endeavouring to obtain the Act of Parliament. The South Eastern Railway Company, by their Act, had no power so to apply their funds:—*Held*, that the contract was contrary to public policy and the provisions of a public Act, and was therefore void. *McGregor v. The Dover and Deal R. Co.*, 227

2. The plaintiffs having obtained an Act empowering them to make a railway connecting the London and Birmingham Railway with the Great Western Railway, agreed with the latter Company that they might carry their line across the plaintiffs' on a level, the soil of the land belonging to the plaintiffs; and the Great Western Railway Company covenanted with the plaintiffs to construct a railway station at the point of junction for the purpose of transferring passengers and goods from the one railway to the other, and also to stop their trains for the purpose of meeting corresponding trains of the plaintiffs. This agreement was subsequently sanctioned by Act of Parliament. Afterwards, the defendants having previously agreed with the plaintiffs to take a lease of their railway, obtained an Act of Parliament (the 8 & 9 Vict. c. clvi) to enable them to take that lease. It recited, that it had been found that the defendants' railway could not be worked as a separate and independent undertaking with advantage to the proprietors thereof; but that the same might be advantageously worked and used in connection with the London and Birmingham and Great Western Railways, or either of them, by either of the Companies to whom those railways belong. Power was given to the plaintiffs to lease to the London and Birmingham Railway Company their railway, stations, &c., and all their rights, powers, and privileges in relation thereto; and it was declared that it should be lawful for the London and Birmingham Railway Company to accept such lease, and to use, exercise, and enjoy all such powers, rights, and privileges as aforesaid. Pursuant to this Act, the lease from the plaintiffs to the defendants was executed, by which the plaintiffs leased to the defendants

all the stations, &c., and rates and tolls, together with all the rights, powers, and privileges of the plaintiffs in relation thereto; the defendants agreeing, half yearly, to carry to the credit of the plaintiffs, such a sum of money as should be equivalent to one-fourth of the gross sums received by the defendants during the period of six calendar months next preceding, in respect of passengers, goods, and other things carried on the line; and the defendants covenanted, that they would, "at their own expense, during the continuance of the lease, *efficiently work* and repair the railway and works demised, and indemnify the plaintiffs against all liabilities, loss, charges, and expenses, claims and demands, whether incurred or sustained in consequence of any want of repair, or in consequence of not working, or in any manner connected with the working of the same railway and works;" but the plaintiffs were to have no control whatever over the working or management of the line or works. In an action on this agreement for not efficiently working the said railway:—*Held*, First, (*Platt*, B., and *Martin*, B., dubitantibus,) that the London and North Western Railway Company were not bound to work the line for passenger traffic at all events; if as much gross profit could be obtained by efficiently working the railway for goods only, or for passengers only, or for both passengers and goods, a working in any one of these modes would be sufficient.

Secondly, that they were not bound to carry passengers, even if passengers presented themselves, if by working the railway efficiently for goods, it produced as much gross profit as it would by working it for passengers.

Thirdly, that, under the statute authorising the lease, and the lease

itself, the defendants had power to compel the Great Western Railway Company to stop trains on their railway, pursuant to their covenant contained in their agreement.

Fourthly, that the defendants would not be bound necessarily to work the line in connection with trains on the Great Western line: nor,

Fifthly, to work the line in connection with the trains on their own line; nor,

Sixthly, to stop their own trains where necessary for the purpose of working in connection with the plaintiffs' line, if the jury should find that they could work the line effectively without, so as to satisfy the covenant.

Lastly, that the defendants were not to be treated by the jury, for the purpose of considering their liability, as if they were the lessees of a separate and independent line, having no control over the Great Western and North Western lines; and that the covenant "to work efficiently" must be construed with reference to the subject-matter and the character of the covenantors; and that the construction of the word "efficient" would be different in a covenant by a person armed with very limited, or by a person with very extensive powers. *The West London R. Co. v. The London and North Western R. Co.*, 477

3. The plaintiffs and defendants, two Railway Companies, executed a *bonâ fide* agreement by deed, which (after reciting that the plaintiffs' lines intersected a certain coal-field, and formed the means by which the produce of such coal-field might be transported to distant places for consumption; that, the defendants' lines communicating with the lines of the plaintiffs, the defendants were desirous of making arrangements for the passage of their engines and car-

riages over the lines of the plaintiffs, for the purpose of carrying coal, upon payment of a graduated toll in proportion to the quantity carried ; that, the carriage of coal forming an important branch of the plaintiffs' revenue, they were apprehensive that such arrangements might injuriously affect both their coal and general traffic, and had declined to accede to them, unless they should be guaranteed from injury therefrom ; and that the two Companies, being unable to determine upon any fixed rate of toll by which that result could be secured, had agreed to enter into the contract contained in the deed, for tolls fluctuating as therein-after mentioned :) provided, first, that the defendants might, for twenty-one years, pass over the plaintiffs' lines, and have free use of their works and conveniences, engines, waggons, &c., for the purpose of carrying coal. Secondly, that such passage should be on payment of the tolls and on such conditions as thereafter mentioned ; that is to say, when, during any period of six months commencing on a given day, less than 125,000 tons of coal should be carried, the defendants should pay to the plaintiffs such a toll as would, with any clear profit made by the plaintiffs for the same period, be sufficient to enable the plaintiffs to pay the dividends for such six months on their guaranteed or preference shares, and a dividend at the rate of 3*l.* per cent. per annum for such six months on the calls paid up on their ordinary shares ; when more than 125,000 tons and less than 150,000 were carried, such sum as would make up, in like manner, the dividends on the preference stock, and 3*l.* 5*s.* on the ordinary stock, and so on progressively, by advances of 25,000 tons up to the carriage of upwards of

400,000 tons, when the defendants were to pay the plaintiffs such sum as, together with the clear profits made by the plaintiffs, would pay the dividends upon the preference stock, and 6*l.* upon the ordinary stock. And there was then a proviso, that, if the payment by the defendants, for any six months, made up 4*l.* 10*s.* per cent. on the ordinary stock of the plaintiffs, the toll should never fall below the sum which would enable the plaintiffs to pay that dividend :—*Held* (by a majority of the Court of Exchequer, and affirmed in error), in an action upon the deed for toll for the use of the plaintiffs' line, that the contract was legal, as being one which the Companies were competent to make and not ultra vires, the payments to be made under it being within the meaning of the word "toll" in the 87th section of the Railways Clauses Consolidation Act, 1845, (8 Vict. c. 20). *The South Yorkshire R. and River Dun Co. v. The Great Northern R. Co.*, 744

4. A clerk to an engineer of the defendants, a Railway Company, agreed with the plaintiff for the purchase from him of some railway sleepers on certain special terms. The sleepers were afterwards delivered to and used by the Company :—*Held*, that there was evidence from which a jury might infer a parol contract by the directors, on behalf of the Company (which would be valid under the 8 Vict. c. 16, s. 97), on the terms agreed to by the clerk. *Pauling v. The London and North Western R. Co.*, 816

CONTRIBUTORY.

See WINDING-UP ACTS.

CORPORATION.

See ACTION, 2.

COSTS.

See AGREEMENT, 8, 9.

ARBITRATION.

LUNATIC.

1. A refusal to refer the question in dispute to a tribunal other than the Court of Chancery will not influence the Court in determining the question of costs in favour of or against the party refusing.

The principles which regulate the Court as to costs in cases of specific performance considered. *Sanderson v. The Cockermouth &c. R. Co.*—Ch. 613

2. A landowner filed his bill and applied for an injunction to prevent a Railway Company from prosecuting their works on his land, upon which they had entered without notice and without consent, and which lay without the limits of deviation. On the hearing of the motion, it was ordered to stand over for the decision of the Board of Trade. The Board of Trade decided in favour of the Company. The Court refused to give the plaintiff the costs of the motion.

The Court can make an order as to the costs of a motion, although the motion may not have included any mention of costs. *Pearce v. The Wycombe R. Co.*—Ch. 902

COVENANT.

See COMPANY.

CONTRACT, 2.

TOLLS.

1. By Act of Parliament incorporating the Charing-Cross Bridge Company, they were empowered to build a bridge and erect toll-bars south of a defined line. By a lease entered into between the Bridge Company and the Hungerford Market Company, the Bridge Company covenanted that all passengers

embarking or disembarking from steamboats, and their servants, with or without luggage, &c. should have free access and right of passage from the market to a pier or landing place, to be erected by the Bridge Company, without paying toll for the use of that part of the suspension bridge lying between the market and the pier. The Bridge Company built their bridge and placed toll-gates at the northern extremity of it and south of the defined line, through which all persons going to the steamboats must pass. They also blocked up the entrance to the pier, alleging, that the Market Company were bound to identify, by tickets or otherwise, the steamboat passengers from the general public. The Market Company moved for an injunction to restrain the defendants from hindering the plaintiffs from having the benefit of their covenant, and from obstructing passengers going to or from the steamboats. The Vice-Chancellor refused the injunction, but left the plaintiffs to their action at law.

The Lord Chancellor, on appeal, reversed the decision of the Vice-Chancellor, and granted an injunction. *The Hungerford Market Co. v. The Charing-Cross Bridge Co.*—Ch. 83

2. A Railway Company, being about to construct a railway through the plaintiff's land, and having a bill before Parliament for that purpose, covenanted with him, "that, in the event of the bill being passed in the present session of Parliament, the Company shall, before they shall enter upon any part of the land, pay the sum of 4900*l.* purchase-money, for any portion of his land not exceeding forty-three acres, which the Company may under the powers of their Act require and take for the purposes of their undertaking; that, in addition to purchase-money, the

Company shall pay to the plaintiff, before they shall enter upon any part of the said land, the sum of 7100*l.*, as a landlord's compensation for the damage arising to his estate by the severance thereof, in respect of the lands, not exceeding forty-three acres, to be taken by them:" *Held*, First, that the Company never having entered upon any part of the plaintiff's land, he was not entitled to sue for either of those sums; Secondly, that an absolute covenant to pay the above sums within a reasonable time after the passing of the Act would have been *ultra vires*, and void. *Sir T. R. Gage v. The Newmarket R. Co.*, 168

DELEGATION OF POWERS.

See AGREEMENT, 2, 8, 10, 11.

DEMURRER.

See ABANDONMENT, 1, 3.
PLEADING.

The Court discountenances merely formal and technical causes of demurrer assigned by public Companies. *Browne v. The Monmouthshire R. and C. Co.—Ch.* 682

DEVIATION.

See RAILWAYS CLAUSES CONSOLIDATION ACT.

DIRECTORS, POWERS OF.

See AGREEMENT, 2, 8, 9, 10.
COMPANY.
CONTRACT, 3.
COVENANT, 2.
JOINT STOCK COMPANY.

A Railway Company, by the terms of an Act of Parliament, were to complete a certain line of railway and certain improvements to an existing line within a specified time.

The time elapsed without the works having been done. The Company were about to declare a dividend when one of the shareholders filed a bill, on behalf of himself and other shareholders, against the managing directors and others, praying an injunction to restrain the payment of any dividend until the works specified in the Act of Parliament had been completed. A general demurrer to the bill was allowed, but without costs:—*Held*, that the Court has not jurisdiction, in a bill so framed, to interfere, on the mere ground that the managing directors are not discharging their duty to the public.

That the Court will not interfere to prevent the misapplication of the income of the Company, it being a subject for internal management and regulation.

Semble, that it is not settled by decision, to what extent or subject to what particular limitations the jurisdiction of the Court, to prevent or check the erroneous conduct of corporations created for public purposes, ought to be exercised. *Browne v. The Monmouthshire R. and C. Co.—Ch.* 682

DIVIDENDS.

See DIRECTORS.
SHAREHOLDERS.

EASEMENT.

By an Act of Parliament passed in 1846, and by a subsequent Act passed in 1850, the Great Northern Railway Company were empowered to make a junction with the East and West India Docks and Birmingham Junction Railway Company, and that Company were to afford facilities for effecting such junction; and the plans were to be submitted to, and to be approved by the engineer for the time being of

the said Company; and in case of difference between the engineers of the two Companies, it was provided that the same should be determined by an umpire, to be named by such engineers; or, in case no such umpire should be appointed for twenty-one days after notice, then by an umpire to be appointed by the Railway Commissioners. Both the Companies were respectively incorporated by Acts of Parliament passed in 1846; the plaintiffs' Act receiving the Royal Assent a few days earlier than that of the defendants. Each of the Companies had power to purchase a long strip of land running parallel with the defendants' railway as afterwards constructed.

In the year 1852, and after the powers of the plaintiffs to take land compulsorily had ceased, they gave notice to the defendants of their intention to form a junction, and submitted plans for that purpose to the engineer of the defendants' Company.

The defendants, having purchased the strip of land over which it was necessary that the works of the plaintiffs should be constructed in order to form a junction, refused to approve the plans, alleging that the plaintiffs could not compel the defendants to give up their land to enable the plaintiffs to make a branch railway over it. It being impossible for the plaintiffs to effect a junction except by passing over this land, they thereupon filed their bill, and now moved for an injunction to restrain the defendants from interfering with the plaintiffs in making a junction, and from withholding all proper facilities for effecting the same.

Held, that, upon the completion of their line, or within a reasonable time afterwards, the defendants were bound to allow the plaintiffs to tra-

verse their land, and to afford facilities for the junction; and that the expiration of the plaintiffs' compulsory powers to take land did not affect their right to use so much of the defendants' land as they might require for the purposes of their Act by way of easement, but not as actual owners.

That the Court has jurisdiction to settle the plan of junction, if the mode of settling it provided by the Act cannot be carried into effect.

The injunction was granted accordingly. *The Great Northern Co. v. The East and West India Docks and Birmingham Junction Co.*—Ch. 3.

EXECUTION.

See COMPANIES CLAUSES CONSOLIDATION ACT.

FENCES.

See ACTION, 4.

RAILWAYS CLAUSES CONSOLIDATION ACT, 1.

FORFEITURE.

See PLEADING.

INFANT.

See CALLS, 2.

INFORMATION.

See NUISANCE.

An information was filed, at the relation of the corporation of S., praying that a Railway Company might be restrained from proceeding with the construction of or opening a railway from A. to B., without proceeding with and opening a converging line to S., or until they had given notice to the landowners of the S. line to treat for and purchase the land required for the S. line. No specific relief was prayed. A general demurrer to the information

was allowed by the Vice-Chancellor *Knight Bruce*, on the grounds, that no injury was shewn to result to the public by the partial opening of the line; that the proceeding by writ of mandamus was open to the public; and that the probability of no writ of mandamus issuing before the expiration of the Company's powers did not constitute an equity; and by the Lord Chancellor, on the ground, that no sufficient cause had been shewn for the interference of the Court on the application of the Attorney-General. *The Att.-Gen. v. The Birmingham and Oxford Junction R. Co., &c.*—Ch. 972

INJUNCTION.

See ABANDONMENT, 2, 3, 4.
 AGREEMENT, 2, 10, 11.
 COMPULSORY POWERS.
 COVENANT, 1.
 DIRECTORS.
 EASEMENT.
 INFORMATION.
 MANUFACTORY.
 NUISANCE.
 PARLIAMENT (APPLICATION TO).
 REVERSIONER.
 ROAD.
 SHAREHOLDERS.

INTEREST ON PURCHASE-MONEY.

See PURCHASE-MONEY, 3, 4.

JOINT STOCK COMPANY.

See CALLS.

1. A Joint-stock Company, completely registered, is not liable for work done for them during provisional registration, or previously. *Hutchinson v. The Surrey Consumers Gas Light and Coke Association*, 158

2. A Joint-stock Company, completely registered, carried on busi-

ness under a deed of settlement, which empowered the board of directors to appoint a manager of the works to superintend the manufacturing business. The board were entitled to delegate such of their powers to the manager as would enable him to carry on the works. They had power to do all other acts necessary for the objects of the Company. The entire management of the affairs of the Company was given to the board of directors, who were empowered to delegate their power to any one or more of their body.

Orders for goods were given, severally, by their chairman, deputy chairman, manager, and secretary; and the goods were delivered on the premises of the Company, and used in their business, with the knowledge of the directors:—*Held*, first, that it was consistent with the Joint-stock Companies Act and the deed of settlement, that the manager had a delegated authority to order such goods; and, secondly, that, though the chairman and secretary might have no such power, and though their orders were never duly adopted, yet, as the goods were had with the knowledge of the directors, the Company were liable. *Smith v. The Hull Glass Co.*, 287

3. A society was established for raising money by subscription, and lending it to their members at interest; premiums on the loans were payable monthly, and all the money received for interest, premiums, and fines went into a general fund of the society:—*Held*, that the society was not a Company established for the purpose of profit within the Joint-stock Companies Registration Act, and therefore did not require to be registered. *Bear v. Bromley*, 507

4. The holder of shares in a Joint-stock Company, who has not exe-

cuted the deed of settlement, is not entitled to a certificate of proprietorship under section 51 of 7 & 8 Vict. c. 110. *Wilkinson v. The Anglo-Californian Gold Mining Co.*, 511

LACHES.

See ABANDONMENT, 2.
NUISANCE.

LANDOWNER.

See AGREEMENT, 3, 4, 5, 6.
COMPULSORY POWERS.
COSTS.
COVENANT.
EASEMENT.
LANDS CLAUSES CONSOLIDATION ACT.
REVERSIONER.

LANDS CLAUSES CONSOLIDATION ACT.

See ARBITRATION, 2.
COMPENSATION.
LUNATIC.
MANUFACTORY.
PURCHASE-MONEY, 2.

1. A landowner, alleging that his land was injuriously affected by the making of a railway, gave notice to the Company, under the 68th section of the Lands Clauses Consolidation Act, to summon a jury to assess the amount of compensation. The Company filed their bill, and obtained an injunction to restrain the landowner from proceeding under his notice. The injunction was granted by the Vice-Chancellor; but, in consequence of a decision of the then Lord Chancellor, the injunction was afterwards dissolved. In the interval, the twenty-one days, within which the Company were to summon the jury or in default to pay the full amount claimed, expired, but no mention was made of this fact on the motion to dissolve. The Com-

LUNATIC.

pany then applied to the Lord Chancellor to alter the order, by imposing terms on the landowner, so that he should not avail himself of the lapse of time, such lapse having been occasioned by the decision of the Court. The Court refused to accede to the application. *The South Staffordshire R. Co. v. Hall*—Ch. 983

2. A notice by a Company to a landowner, requiring to take his land for the purpose of the undertaking, is an exercise of the powers for the compulsory purchase of land within the 123rd section of the Lands Clauses Consolidation Act; and if within the prescribed period, such notice be given, the steps necessary to complete the purchase may be taken after that period.

An entry on land is not the exercise of any of the powers of compulsory purchase, but the exercise of a power for carrying the compulsory purchase into effect. *The Marquis of Salisbury v. The Great Northern R. Co.*, 17

LEASE.

See ACTION, 2.
AGREEMENT, 10.
COMPANY.
CONTRACT, 2.

LUNATIC.

Where the committee of a lunatic's estate contracts, under the power of the Lands Clauses Consolidation Act, with a Railway Company for the sale of a piece of the lunatic's land, the costs of the attendance of the heir-at-law before the Master, and on the petitions come within the 80th section of that Act, and must be borne by the Company. *Walker, a Lunatic, Ex parte The Manchester and Leeds R. Co.*—Ch.

MAJORITY AND MINORITY.

See AGREEMENT, 2.

PARLIAMENT (APPLICATION TO).

MANDAMUS.

1. The writ stated that the defendants had obtained an Act of Parliament in 1846, reciting that it would be of public advantage if a Railway were formed from York to Beverley by Market Weighton, and that they were willing to execute the same, and that it was enacted that it should be lawful for the defendants to make and maintain the same. That the Company made and opened to the public this branch from York to Market Weighton. That in 1849 they obtained another Act, to enable them to divert this line between Market Weighton and Cherry Burton, a place three miles from Beverley: which recited that it would be an advantage if such diversion were made; that the defendants were willing to make such diversion; and that it enacted that it should be lawful for the defendants to make such deviation. That Burton and Leaing were owners of a portion of the land required by the defendants; and that part thereof had been conveyed to the defendants for the purpose of the line as originally authorised. The writ then commanded the defendants to complete the line between Market Weighton and Cherry Burton.

Held, by Lord Campbell, C. J., Crompton, J., concurring, that the mandamus was good, and that the Company were bound to complete the line.

Whether a Company, incorporated by Act of Parliament, which says that "it shall be lawful for them" to make a certain Railway, are bound to make it, if they have never avail-

ed themselves of the extraordinary powers conferred upon them, and they have come to a resolution to abandon the undertaking before they had begun to execute it—*Quære*. Though, down to the time when the Company in fact exercise the extraordinary powers conferred upon them over the property and rights of others, the power to do so may be only permissive, a different state of things arises when they begin the exercise of those powers, and have taken land under the Act, and when they purchase it under their compulsory powers, which they do when they serve a notice requiring the land, they enter into a contract to construct the Railway with the termini specified in the Act. The engagement of such a Company is part of the compensation given to the landowner.

The defendants returned, that, of the line from York to Beverley, the part between Cherry Burton and Beverley had not been begun to be made, and that the compulsory powers of purchasing land for making it expired in July, 1851:—*Held*, that there was no allegation of impossibility or want of power to purchase lands to complete the line between Market Weighton and Cherry Burton, and that the return was bad.

It further alleged, that Cherry Burton was a small village, that a convenient station could not be made there for the inhabitants of Beverley, and that the district between Market Weighton and Cherry Burton was thinly peopled, and that there were means of convenient communication from that to other places in England irrespective of this railway to Beverley:—*Held*, bad.

It also alleged that the portion of the line described in the mandamus could not be remunerative:—*Held*,

bad ; though an absolute exhaustion of funds, and an impossibility of raising any, might be a good return.

If, upon an application for a mandamus, it were clearly made out that the Company, though carrying out the design with good faith and prudence, was, from unforeseen casualties, left entirely without funds, the Court would refuse the application.

Held, by *Erle, J.*, that the statute alone created no duty to complete the line. That the obligation arising from taking land to make the railway thereon is fulfilled by making and opening an available railway as far as the land taken. *Reg. v. The York and North Midland R. Co.*, 236

But, *held*, on a writ of error reversing the judgment of the Court of Queen's Bench, that the mandamus was bad ; that the words of the Act, "it shall be lawful for the Company to make the railway," were permissive only and not imperative ; that there was no duty cast upon the Company to make the railway ; and that the Company were not bound to complete the line.

That the Company, having exercised some of their powers and made part of the line, were not bound to make the whole of the railway authorised.

Railway Acts cannot be considered as contracts ; they give conditional powers, which generally, if acted upon, carry with them duties ; but which, if not acted on, are not imperative on the Companies.

If a Company empowered by Act of Parliament to build a bridge over a river were to build a part only, *quære* whether they could not be indicted for a nuisance in obstructing the river, or for not completing the bridge ? *The York and North Midland R. Co. v. Reg.*, 459

When a Railway Company avail

themselves of extraordinary power conferred upon them at their solicitation, and on their own representations that the projected way will be of public benefit, getting possession of lands with the consent of the owners, and ginning the formation of the way, there is a duty incumbent upon them to complete the undertaking and the Court will compel the performance of that duty by mandamus, at the instance of a landowner.

The moment the Act receives Royal assent, a contract and obligation attach, though the Act may enact, that "it shall be lawful for them to make the line ; and by the legislature alone can that contract and obligation be discharged. *Queen v. The Lancashire and Yorkshire R. Co.*

MANUFACTORY (PART

A Railway Company, incorporated in 1848, had included in deposited plans, and describe in their books of reference, the value of A.'s property, of which, however, only a small triangular piece of land was within the limits of deviation. A., after the passing of the Act, erected sheds and buildings on a piece of land. The Railway Company, in 1851, served the notice on A. of their intention to take the land included within the limits of deviation. A. then served on the Company a counter-notice, stating that the piece of ground which the Company had given notice to take, was part of a manufactory ; and that, if they took any part of his property, they would take the whole, under the 92nd section of the Lands Clauses Consolidation Act. The powers of the Company to take land compulsorily expired shortly after the deliv-

the notice. The Railway Company were about to enter on A.'s property under the provisions of the 85th section of the beforementioned Act, when A. filed his bill praying an injunction to restrain them from taking a part unless they took the whole of his manufactory. The Vice-Chancellor *held*, that, as the powers of the Company to take land compulsorily had not ceased when the notice to take was given, the Company were not precluded, by the subsequent expiration of those powers, from entering and completing possession of the land; and that the 92nd section of the General Act was not applicable to or consistent with the provisions of the Company's Special Act. He therefore refused the motion for an injunction.

The plaintiff having renewed his motion, by way of appeal, before the Lords Justices, their Lordships granted an injunction to restrain the Company from doing any act affecting the land, until they had established their title at law to take a part, or were willing to take the whole of the manufactory.

The parties having afterwards agreed to have the cause brought to a hearing on affidavits, the Court made an order for that purpose; and the legal and equitable questions having, by consent of parties, been submitted to the Lords Justices:—*Held*, that the 92nd section of the Lands Clauses Consolidation Act was incorporated into the Special Act, and was not inconsistent with it; and that the piece of land which the Company had given notice to take, was part of a manufactory. That the interim injunction must therefore be made perpetual.

Seem, that fraud or unfair intention will not weigh with the Court, unless it be shewn that thereby

the complainant has been induced to pursue a particular line of conduct which he would not otherwise have pursued. *Sparrow v. The Oxford, Worcester and Wolverhampton R. Co.*—Ch. 92

NOTICE.

See ARBITRATION, 2.

LANDS CLAUSES CONSOLIDATION ACT.

MANUFACTORY.

NUISANCE.

Two Gas Companies, amalgamated by Act of Parliament, supplied the town of S. with gas. A third Company, completely registered, but without parliamentary sanction, commenced laying down pipes in the public streets. The amalgamated Companies filed their bill, alleging injury to their pipes, and applied for an injunction:—*Held*, by Sir G. J. Turner, V. C., that the plaintiffs, possessing no right in the soil, had a sufficient legal remedy for their private injury, and were not entitled to an injunction. That the jurisdiction of Courts of equity to interfere by injunction is founded on the insufficiency of the legal remedy, the equitable being superadded to the legal remedy.

The plaintiffs then changed their bill into an information and bill, alleging public as well as private injury, and again moved for an injunction before Sir G. J. Turner, V. C.; which he refused.—The motion was then renewed, by way of appeal, before the Lords Justices.

Held, by the Lords Justices, that the present case did not call for the special interference of the Court by injunction.

That notice of objection or of opposition does not excuse delay in instituting proceedings.

That a Court of equity is not

bound to interfere by injunction in all cases amounting to a nuisance at law.

The plaintiffs again moved for an injunction, on new facts, before the Lords Justices; when it was agreed that the hearing of the cause and motion should come on together before the full Court.—The Lord Chancellor and Lord Justice *Turner* (Lord Justice *Knight Bruce* dissentiente) refused the injunction; and

Held, that the interference of the Court by injunction is influenced by the degree of nuisance; and that the inconvenience to the public in the present case, being of a temporary nature and not affecting the general body of the inhabitants, did not call for the special interference of the Court.

That time is an element to be considered in determining a question of injunction, even though the application be by the Attorney-General on behalf of the public.

That the Court recognises no distinction in its dealing with a case of private or public nuisance. *The Sheffield United Gas Co. v. The Sheffield Gas Consumers Co.*—Ch. 650

PARLIAMENT (APPLICATION TO).

See SHAREHOLDERS.

1. In a Railway Company there were two classes, the holders of old and the holders of new shares, having different rights. It was resolved, by a majority of the shareholders at a general meeting, that an application should be made by bill in Parliament for an Act, by which, if obtained, the rights of the two classes of shareholders inter se would be altered.

A dissentient holder of new shares filed his bill, and moved for an

injunction to restrain the directors from using the funds or the corporate seal of the Company for the any other like purpose:—*Held*, the application to Parliament authorise such a scheme was a breach of trust or of duty on part of the directors.

That the principles admitted to be applicable to private partner in such cases, are not to be applied to public companies.

That the then present funds of the Company, having been subscribed under a definite contract, were not applicable to a scheme of commutation of the privilege served under that contract.

That the directors be at liberty to use the name and seal of the Company, upon giving an undertaking that the dissentient shareholders should be heard before Parliament against the bill. *Stevens v. Devon R. Co.*

2. The Great Western Railway Company was authorised by Act of Parliament to subscribe to the Great Western Railway Company, and the shares were vested in trustees for them. They were to have certain powers with reference to the management and the appointment of directors. The directors of the Great Western Railway Company, after unsuccessful attempts to enter into an agreement with the Great Western Railway Company, appointed a special committee, from which the directors appointed by the Great Western Railway Company were excluded, and, without the sanction of the latter Company, determined to construct an extension line, and to apply to Parliament for the necessary powers for that purpose; and notices of such intended application were duly advertised. The Great Western Railway Company then upon filed their bill, praying for

injunction to restrain the O. Railway Company and their directors, other than those who were directors of the G. W. Railway Company, from using the funds and monies of the O. Railway Company in or towards payment of the costs occasioned by the new scheme, or in promoting the said bill or any other bill for the like purposes; and from entering into any contracts in the name or on behalf of the O. Railway Company with reference to the said or any like scheme, or to the said bill or any other bill for the like purposes; and from excluding the said six G. W. directors or any of them, or any other of the G. W. directors, from access to any information concerning the proposed scheme and the promotion of the said bill; and from excluding the said six directors from full participation in and management of the affairs of the O. Railway Company, and from access to their books, papers, &c.; and from receiving full information of the proceedings of every committee of the Company's directors:—*Held*, that the interest of the G. W. Railway Company was sufficient to maintain the suit, and that it was properly framed. That the application to Parliament for an extension line was a lawful object, if lawfully pursued. That, to defray the expenses of applying to Parliament out of the funds of the Company was an illegal application. That, although the voice of a minority, if present, might not affect the result of the resolutions of a meeting, the exclusion of that minority rendered the meeting illegal.—Injunction granted accordingly. *The Great Western R. Co. v. Rushout*—Ch. 991

3. A Railway Company was authorised to make certain branch railways to the River Dee, and to make

approaches and such other works as they might think necessary. The navigation of the river being neglected by the conservators, the directors of the Railway Company received the sanction of the shareholders at a public meeting to take such steps and incur such necessary expenses as appeared to them calculated to improve the navigation. The directors thereupon promoted a bill in Parliament for the purpose of appointing new conservators of the river, and expended some of the funds of the Company in this object. Some dissentient shareholders thereupon filed a bill, and moved for an injunction to restrain the directors from applying the monies of the Railway Company in promoting the bill in Parliament, or for any other purpose not authorised by the Acts of Parliament relating to the Railway Company.—The Master of the Rolls granted the injunction as moved for. *Munt v. The Shrewsbury and Chester R. Co.*—Ch. 1002

PARTIES.

See ABANDONMENT OF PART OF RAILWAY, 1, 3.

AGREEMENT, 2, 8.

PLEADING.

A declaration in case against a Railway Company stated, that N. appeared on the Register of Shareholders of the defendants to be and was owner of 300 shares in their undertaking; that the plaintiff bought the shares of N., who, by a deed, transferred the same to him, subject to the conditions on which N. held them; and that the plaintiff afterwards caused the same to be delivered to the secretary of the defendants, in order that the defendants might enter a memorial on the register of transfers, and indorse such entry on the deed of transfer, and

might on demand deliver a new certificate to the plaintiff as the purchaser of the shares; yet the defendants did not, nor did any other person, enter any such memorial, or indorse any entry; whereby the plaintiff had been deprived of his right and title to appear on the books of the defendants as holder and proprietor of the shares; and by reason of N. still appearing by the register to be the holder of the shares, and of calls having been made by the defendants upon persons so appearing by the last-mentioned book to be holders and proprietors of the said shares, and (among others) upon N., and by reason of the failure of N. to pay the calls, the defendants declared the shares forfeited; which forfeiture having been afterwards confirmed at a general meeting of the Company, and the shares so forfeited directed to be sold for the purpose in the last-mentioned Act declared, and according to the provisions thereof, the shares were sold by the defendants, and the plaintiff had thereby been deprived of his right to compel the defendants to make such entry and indorsement as aforesaid, and to deliver to the plaintiff such certificate, and had also been deprived of the shares and all benefit thereof, and all the dividends and other profits which he might have derived therefrom, and also of the benefit of selling the shares at an increased premium, the shares having since risen in value.

The second count stated, that the plaintiff was the lawful holder of, and well entitled to, 300 shares in the undertaking of the defendants; that the defendants, without lawful cause, and in pretended exercise of the powers conferred by the Companies Clauses Consolidation Act, 1845, wrongfully declared the shares forfeited, and afterwards confirmed such forfeiture and sold the same,

whereby the plaintiff had been deprived of the said shares and benefit thereof:—*Held*, on special demurrer, that both counts were good. *Catchpole v. The Amberg Nottingham and Boston, and Eastern Junction R. Co.*

POOR RATE

See RATING.

POWERS.

See AGREEMENT, 2, 8, 9, 10.

CONTRACT, 3.

DELEGATION OF POWERS.

DIRECTORS (POWERS OF).

JOINT STOCK COMPANY, 2.

PRACTICE.

See AGREEMENT, 1.

CALLS, 2.

DEMURRER.

MANUFACTORY, 1.

PUBLIC: PUBLIC USE

See ABANDONMENT, 4.

NUIRANCE.

REVERSIONER.

PURCHASE MONEY.

See BROKERAGE.

1. The purchase-money of land in settlement, taken under the power of the 5 & 6 Will 4, c. 69, from persons having a limited interest, is for the purposes of devolution, realty and not personality. *Re Hoare's Estate*—Ch.

2. A Railway Company took possession of land under their compulsory powers; but, previously to payment of the price, they entered into an agreement for purchase with persons alleging that they had a good title, and that they could convey free from incumbrances. The consideration money was fixed at a certain sum for the whole. It afterwards appearing that the owners of the whole could only convey their title to a part, the Rs

Company paid the entire sum into Court, under the 69th section of the Lands Clauses Consolidation Act; this sum was apportioned, and the value of the land to which a good title could be made was stated by affidavit. The vendors then presented a petition, praying that the sum apportioned to them might be carried over to a separate account, and that the dividends might be paid to the tenant for life. The Court ordered the sum apportioned as the value of that part of the land to which a good title could be made to be carried over to the account of the petitioners, and the dividends to be paid to them, the principal not to be paid out without notice to the Railway Company. *Re Perkes, &c.*—Ch. 605

3. A tenant for life agreed to sell land to a Railway Company. There was delay in paying the money into Court, and further delay in investigating the title, and in the investment of the sum deposited. The vendor, by letter, stated that he should require interest at 5l. per cent. on the purchase-money until the completion of the purchase:—*Held*, that the vendor was entitled to interest up to the date of the investment of the purchase-money. *Ex parte Lord Hardwicke*—Ch. 919

4. By an agreement, entered into between a tenant for life of certain settled estates and a Railway Company, it was agreed that the purchase-money should remain in the hands of Messrs. G., bankers, at the risk of the Company, until the completion of the purchase, when the same should be paid over to the parties respectively entitled to the same, or be paid into the Court of Chancery, as the case might be; and that the Company should pay interest on the said purchase money, at 5l. per cent., up to and inclusive

of the day on which the said purchase should be completed.

The solicitors forwarded the engrossment of the conveyance to the vendor, and paid the money into Court, to the account of the Company's Act, but no petition was presented for investment.

The vendor sent in his charges and a calculation of interest up to the day on which the money was paid into Court; and two years afterwards sent in another account, with a calculation of interest up to that date. The Company disputed the right of the vendor to interest subsequently to the payment of the purchase-money into Court:—*Held*, that, according to the true construction of the agreement, evidenced by the conduct of the parties, the completion of the purchase must be the payment into Court of the purchase-money by the purchasers. *Lewis v. The South Wales R. Co.*—Ch. 923

RAILWAYS CLAUSES CONSOLIDATION ACT.

See AGREEMENT, 8, 9, 11.

CARRIER, 1, 4.

CONTRACT, 3.

ROAD.

1. The Railways Clauses Consolidation Act, 8 & 9 Vict. c. 20, s. 68, "That a Railway Company shall make and maintain sufficient fences for separating the land taken by the railway from the adjoining lands not taken, and protecting such land from trespass or the cattle of the owners or occupiers thereof from straying thereout by reason of the railway," extends to the making and maintaining a fence between the railway land and a highway running alongside of it.

But when cattle are straying on the highway and not lawfully passing along it, the owner of them

cannot maintain an action against the Company for injury occurring to them from their getting on the railway, through a defect in the fence between it and the highway, as the owner in such case is not, in law, an occupier of the highway, and there is no obligation to maintain the fence as against him, either by this statute or at common law. *The Manchester, Sheffield, and Lincolnshire R. Co., Appa., Wallis. Resp.*, 709

2. Under the 13th and 15th sections of the 8 Vict. c. 20, where a tunnel is marked on the deposited plans of a railway, there can be no deviation within the limits of deviation, unless the landowner consent; but the tunnel must be made at the spot indicated: and if the Company deviate where they ought not, no special duty is imposed upon them to make a tunnel on the deviated line. *Little v. The Newport, Abergavenny, and Hereford R. Co.*, 280

RATING.

1. The R. Railway Company, under the powers of their Act, leased their line, which joined the S. E. Railway, to the S. E. Railway Company, at a certain rent, for 1000 years; and the S. E. Company became, under the lease, the occupiers of the line, working it in connection with their own railway. The R. Company was afterwards incorporated with the S. E. Company by Act of Parliament, under which the amalgamated Company was to pay to the shareholders of the R. Company annuities equivalent to and in lieu of the above rent; and the R. line then became part of the S. E. line. On an appeal against two poor-rates, assessed upon the S. E. Company as occupiers of so much of the R. line as passed through the parish of D.,—the one made during the existence of the lease, and the other after the amal-

gamation:—*Held*, that the rent in the one case, and the annuities in the other, were not to be taken as the sole or conclusive criterion of the rateable value.

The R. line brought a great deal of additional traffic to the main line of the S. E. Company, and the Company derived benefit from the R. line as a feeder to the main line in respect of traffic conveyed up that line. The R. line, if in competition between the S. E. Company and other Railway Companies; traffic on the main lines of which would be increased by the possession and control of the R. line.

Held, by Lord Campbell, C. Coleridge, J., and Crompton, (Erle, J., dissenting), that it was matters giving additional value to the occupation of the R. line in the parish of D., which, though higher in other parishes, ought to be taken into account in rating the line in that parish.

Held, by Erle, J., that the earnings in other parishes, though increased by the occupation of the line in the parish of D., ought to be rated in those other parishes, and in D. *The South Eastern R. Appa.; The Churchwardens, of Dorking, Resps.*

2. The appellants being employed to make a branch line for their railway to join the E. Railway, an agreement was entered into by the Companies (confirmed by Act of Parliament), by which it was mutually agreed, that the appellants should complete the branch (which was likely to prove beneficial to the E. Company); and that whenever, after the opening of the branch, the net earnings of the appellants' whole line should not be sufficient to pay a dividend of 5 per cent. per annum on their capital, the E. Company should

to the appellants such a sum (not to exceed 5000*l.*) as would be sufficient to make up that dividend. There were stipulations for the interchange of traffic. The agreement to be in force for ninety-nine years from the opening of the branch.

The branch was accordingly completed by the appellants, and worked by them at a loss; and, in a certain year, the net earnings of the whole line of the appellants falling short of a dividend of 3*l.* per cent., the E. Company paid 3705*l.* under the agreement to make up that dividend.

On an appeal against a poor-rate assessed on the appellants in respect of their occupation of a portion of the branch railway—

Held, by Coleridge, J., and Erle, J., (Lord Campbell, C. J., dissenting), that this payment of 3705*l.* ought not to be taken into account in ascertaining the rateable value of the appellants' railways. *The Newmarket R. Co., Apps.; The Churchwardens, &c. of St. Andrew the Less, Cambridge, Resps.*, 858

3. A Company was incorporated by Act of Parliament, and empowered to establish and maintain a ferry over the public tidal and navigable river Tyne; to take lands and erect ferry houses and landing places on either side of the river, and to receive certain tolls for the passage of the ferry. The landing places on either side were in the parishes of North and South Shields respectively; but the ferry boats, when working, were always afloat and in the parish of N.; and they varied their course in crossing according to the state of the tide &c. The tolls (which were the only profit derived by the Company from the ferry and landing places) were collected at the South Shields landing place. The Company having been assessed to the poor rates in the parish of South Shields "as occupiers of a ferry,

landing, and tolls," at one-half the entire net profit of the tolls; on appeal from that rate—*Held*, first, that the tolls could not be directly rated as landed property from their connection with the landing places, nor indirectly by laying the rate on the landing places and treating the half of the entire net proceeds of the tolls as the direct profit of each landing place; and that, therefore, the rate could not be supported.

Secondly: That, in rating the landing places, the tolls should not be entirely excluded from consideration; but that the landing places should be rated as land rendered more valuable by being available for the purposes of earning the tolls.

Held, also, that the mileage principle was not applicable, so as to assess a portion of the profits on the two landing places according to the proportion which their dimensions bore to the length of the transit over the river. *Reg. v. The North and South Shields Ferry Co.*, 849

4. The Hull Dock Company are the owners and occupiers of several docks and basins (constructed under various Acts of Parliament), which communicated with each other, but are situate in several parishes. By the various statutes, the Company is empowered to charge certain tonnage duties on every ship entering or going out of the harbour, basin, or dock within the port of Hull, or unloading or lading any of its cargo within the port, to be paid on the entrance of the ship inwards or on its clearance outwards. The same duties are payable into whatever dock the ship enters, and whether it use only one or more of the separate docks or basins; such duties becoming payable as soon as the ship enters any one of the docks:—*Held*, that, in assessing the Company to the poor-rates, the entire rateable value of the whole of the docks

should be ascertained, and then divided among the several parishes within which the docks, &c. are situated, in proportion to the area of the docks in each parish. *Reg. v. The Dock Co. at Kingston-upon-Hull*, 836

5. The Great Western Railway Company were assessed to a poor-rate in respect of their occupation of two and a half miles of railway in the respondent parish, which two and a half miles were part of a line of twenty-five miles, constituting what was originally intended as an entire line (The Berks and Hants Railway), but which was constructed at the cost of and is now owned and worked by the Great Western Railway Company, being by Act of Parliament incorporated therewith. A certain number of engines and carriages are appropriated to it, and a certain number of officers and servants are employed exclusively on that branch. No separate accounts of receipts and expenditure of this branch are kept, but they are included in the general half yearly revenue accounts. It could be worked as a separate railway, but this would require a larger moveable stock and a greater expenditure than the Company now actually employ on it. The actual expenses of the Company are not in the proportion with the actual gross receipts, either on the branch or throughout the entire line, nor are either of such gross receipts or expenses at one uniform rate per mile throughout the entire railway. In order to give the net rateable value of the whole line, the Company, in addition to allowances for annual repairs of rails and framework and of moveable stock, claimed to be allowed for ultimate renewal and reproduction. They did not annually set aside any sum to form a distinct fund for this reproduction, but they retained out of their annual revenue a reserve fund for all

contingencies, including these items—*Held*, that they were entitled to such allowance.

To ascertain the net rateable value of the two and a half miles, the deductions from the total gross revenue are to be apportioned on the parochial principle. The expenses incurred in earning the gross receipts on the two and a half miles are to be ascertained, and then the charges, parochial or otherwise, that they are liable to; and the same process is to be gone through with regard to the two and a half miles as would be if the whole line were in one parish. But this principle does not preclude a consideration of charges wherever arising local which are necessary for keeping the subject of assessment at the value which is made the measure of the assessment; and wherever such charges apply equally to every mile of a railway, the mileage principle may be adopted.

The Company, in order to ascertain the net rateable value of the two and a half miles, separated the branch from the trunk line, except as to a small portion of the general expense of the entire railway, and then divided the expenses of the branch on the mileage principle: *Held*, that, though the Company were not necessarily wrong in the last particular, on the facts of the case they could not so separate the trunk from the branch, the one being absorbed in the other.

The respondents, in order to determine the rateable value of the two and a half miles, ascertained the rateable value of the whole railway, minus the stations; they ascertained the gross actual annual receipts of the Company in respect of each mile in their parish, and then assessed the Company in respect of the two and a half miles in the rate which such annual receipts bore

REVERSIONER.

the gross annual receipts of the Company in respect of the entire of the Great Western Railway trunk and branches, the rateable value of a mile of railway in the respondent parish being calculated in the same proportion to the rateable value of the whole line, exclusive of stations, as the gross actual annual receipts in respect of such mile bore to the total of such actual annual receipts of the Company:—*Held*, that the actual expenses of the Company not being in the proportion of the actual gross receipts, either on the branch or throughout the entire line, and such gross receipts and expenses not being at one uniform rate per mile throughout the entire line, this mode of assessment was wrong. *The Queen v. The Great Western R. Co.*, 130

RENT.

See ACTION, 2, 3.

REVERSIONER.

The plaintiff was lord of the manor of certain copyhold land. A., the copyholder, demised the land to B., who cut a private canal through it, under circumstances from which the consent of A. must be inferred. An Act of Parliament was passed for converting the private canal into a public one; and the power of making that part of it which passed through the lord's lands was given to the lord, and he was invested with the usual powers for that purpose, and amongst others that of compensating the copyholders. No compensation was paid to the persons entitled in remainder to the demised lands. After the expiration of the lease, the reversioners brought their action of ejectment, and were declared entitled to recover the land occupied by the canal. The lord then filed his bill in equity to stay proceedings at law, and to

SHAREHOLDERS. 1047

compel the reversioners to convey to the lord on being paid compensation for their interest, if entitled to any, and to prevent any interference with the uses of the canal by the public:—*Held*, that the Court would restrain the reversioners from obtaining possession of the canal and interfering with the traffic, but declared them entitled to compensation in respect of their interest, such compensation to be estimated according to the value of the surrounding land at the time the reversion fell in. That the reversioners were not entitled to any additional value on the ground of severance or local advantage. No costs. *The Duke of Beaufort v. Patrick*—Ch. 906

ROAD, SUBSTITUTED.

A Railway Company, in the progress of their works, were about to cut through a turnpike road, and to substitute another road, which, in the opinion of the Court, was not so convenient for passengers and carriages as the road interfered with, or as nearly so as might be. The Court granted an injunction to restrain the Company from crossing, breaking up, cutting through, or in anywise interfering with the turnpike road until a sufficient road, within the terms of the Railways Clauses Consolidation Act, had been provided. *The Att.-Gen. v. The London and South-Western R. Co.*—Ch. 624

SHAREHOLDERS.

See ABANDONMENT.

CALLS, 1, 3.

PARLIAMENT.

PLEADING.

The plaintiff was the holder of original shares in a Railway Company. By Act of Parliament, new half shares were created, in respect

of which 61 per cent. was guaranteed for ten years, and other privileges were given; no interest had been paid on these shares for many preceding years, and a large unsecured debt, in addition to bond and mortgage debts, had been incurred by the Company. The plaintiff filed his bill, and moved for an injunction to restrain the directors from paying any preferential interest or dividend on the half shares, while any of the unsecured debt was unpaid, except out of the clear and divisible profits of the current half year.

On the motion, the Company undertook to do nothing contrary to the notice of motion until the hearing of the cause or further order, unless under the authority of Parliament.

By an Act passed in 1851, power was given to issue shares to the amount of certain cancelled shares; and it was enacted that the money so raised should be applicable to the general purposes of the undertaking, with a proviso that the existing debts of the Company, or their mortgage or bond debts, should be paid thereout, and the guarantee on the half shares commuted, on certain conditions therein specified.

The directors, in pursuance of the provisions of the Act, prepared a scheme for the commutation of the half shares, whereupon the plaintiff filed a supplemental bill, alleging that the scheme was not authorised by the Act, and praying an injunction against the directors to restrain them from proceeding with it, and also from paying or declaring any dividend on any shares while any of the unsecured debt remained due, except as therein mentioned.

The scheme having been submitted to and approved by the shareholders, the plaintiff moved for an injunction. The defendants also

moved to be discharged from the undertaking.

Held, that although the Act did not contain any authority which would take the case out of the undertaking, the defendants had the power nevertheless of moving to discharge it; and that, under the altered circumstances of the case, they were entitled so to move, exactly as if an injunction in the terms of the undertaking had been granted as of course.

That an undertaking by a Company not to do anything without the authority of Parliament, may be construed most strictly against the Company; and they cannot be relieved from it, except by positive enactment, or by necessary conclusion drawn from the words of the Act.

That the plaintiff had not made out a sufficient case for the interference of the Court by injunction.

That the holders of half shares were entitled to the payment of their dividends out of any funds of the Company which could be lawfully applied to it, before the holders of the original shares.

That the question of payment of dividends to shareholders, while a debt of the Company remained unsecured, was a matter of internal arrangement, to be settled by the majority of the shareholders.

That the principles applicable to private partnerships, as to the division of profits whilst there are debts unprovided for, are in matters of this sort also applicable to public Companies. *Stevens v. The South Devon R. Co.*—Ch. 6

SHARES.

The effect of the 16th section of the 8 & 9 Vict. c. 16, is to disqualify any shareholder from making an effectual transfer of his share whilst any call remains unpaid; a

the secretary is not bound to register a deed of transfer of such shares whilst a call remains unpaid. *In re Hall and The Norfolk Estuary Co.*, 503

SPECIFIC PERFORMANCE.

See AGREEMENT, 1, 3, 4, 5, 6, 7.

STATUTE

See ACTION, 4.

ARBITRATION, 2.

CALLS, 1.

COMPANIES CLAUSES CONSOLIDATION ACT.

CARRIER, 2, 4, 5.

CONTRACT, 3, 4.

JOINT STOCK COMPANY, 2, 4.

LANDS CLAUSES CONSOLIDATION ACT.

MANDAMUS.

RAILWAYS CLAUSES CONSOLIDATION ACT.

SHARES.

TITHES.

WINDING-UP ACT.

TENANT FOR LIFE.

See ARBITRATION, 1.

TITHES.

Under "The Act for Tithes in London," (37 Hen. 8, c. 12), the rector of St. O. was entitled to claim 2s. 9d. in the pound upon the rent received on all houses in his parish, in lieu of tithes. A Railway Company, under the powers of their Act, took thirty-three of the houses in the said parish, being bound by the 33rd section of one of their Acts to pay to the rector such yearly sums in respect of such houses, "according to the last assessments thereof to the 25th of March last," as would be equal to the loss in tithes which he might sustain for want of occupiers by reason of such taking:—*Held*, by the House of Lords, reversing the

decision of the Vice-Chancellor *Wigram*, that "the last assessments to the 25th day of March last," were the payments made to the rector in lieu of tithes for a period up to and ending the 25th of March. *Letts v. The London and Blackwall R. Co.*,—Ch. 987

TOLLS.

See CONTRACT, 3.

It was agreed between "The Manchester, Bolton, and Bury Railway Company," and "The Bury and Rossendale Railway Company," "first, that they would mutually concur, at the expense of the latter Company, in obtaining an Act of Parliament for a line of railway from the Manchester and Bolton Railway to Bury and Rawtenstall; secondly, that the Bury and Rossendale Railway Company should have the use of the Manchester and Bolton Company's station at Salford, but not to impede the Manchester and Bolton Company's traffic, paying such charge for such requisite additional accommodation to the same, arising from the traffic of the Bury and Rossendale Company, as any three indifferent persons, to whom it should be referred in the usual way, should determine; thirdly, that the traffic of the Manchester, Bury and Rossendale Company, whether of passengers, merchandise, or coal (that is, traffic using both lines or any portions thereof), between Salford and Rawtenstall, or any points intermediate to these, should be carried on, as respects engine-power and carriages, clerks and porters, and all other expenses (except the maintenance of the Manchester and Bolton Railway), at the costs and charge of the Bury and Rossendale Railway Company, who should pay to the Manchester and Bolton Railway Company, for the use of their

railway and in respect to the traffic therein specified, a pro rata proportion (according to the distance passed over the two lines respectively), of all and singular the gross rates, tolls, and proceeds arising from the said traffic, with a proviso, that nothing therein contained nor elsewhere provided should authorise the Manchester and Bolton Railway Company to receive, for the use of their railway between the point of junction of it with the Bury and Rossendale Railway and Salford, for a greater distance than half the length between such point of junction and the terminus of the Manchester and Bolton Railway at Salford; nevertheless, the Manchester and Bolton Railway Company should be entitled to charge, for the use of such portion of their railway, for a length of two miles at the least." After the making of this agreement the Manchester, Bolton, and Bury Railway Company was incorporated with the Manchester and Leeds Railway Company, and ultimately became "The Lancashire and Yorkshire Railway Company," and the Bury and Rossendale Railway Company became "The Manchester, Bury, and Rossendale Railway Company," and ultimately, after further extensions, became "The East Lancashire Railway Company;" and by subsequent Acts of Parliament certain other railways became incorporated with it. The length of the Manchester, Bolton, and Bury Railway, from the station at Salford to its point of junction with the Manchester, Bury, and Rossendale Railway, at Clifton, was four miles and no more:—*Held*, in the Exchequer Chamber (reversing the judgment of the Court of Exchequer), that the right of the East Lancashire Railway Company, under the agreement, to use the railway of the Lancashire

WINDING-UP ACTS.

and Yorkshire Railway Company was extended by the subsequent Acts of Parliament to all traffic passing over the original line of the former from or to Manchester, whether its transit commenced or ended in any part of that line, and whether it came from or went to a station upon any part of the main and extension lines; but (affirming the judgment of the Court of Exchequer) that the pro rata proportion of toll, payable by the East Lancashire Railway Company, was to be ascertained by the relative distances passed over the two original lines specified in the agreement. *The East Lancashire R. Co. v. The Lancashire and Yorkshire Co.*, 8

TRAFFIC.

See TOLLS.

TRANSFER OF SHARES.

See PLEADING.
SHARES.

TUNNEL.

See RAILWAYS CLAUSES CONSOLIDATION ACT.

USE AND OCCUPATION.

See ACTION, 2, 3.

WINDING-UP ACTS.

See ACTION, 1.
CALLS, 1, 3.

1. The 50th section of 11 & Vict. c. 45, applies only where Company is sued *quâ* Company, and not to actions brought against individual contributories. The 62 section applies where all or some of the contributories individually are sued. *Beardshaw v. Lord Londborough*, 1

2. An interim manager is not the same as the official manager under

the Winding-up Act, 11 & 12 Vict. c. 45; and therefore the 73rd section of that Act does not apply where only an interim manager has been appointed. *Brettell v. Dawes*, 444

3. The 13 & 14 Vict. c. 83, is retrospective in its operation.

An order for the dissolution of a Company under the Joint-stock Companies Winding-up Act is no bar to an action against the Company by a creditor. Section 73 operates as a suspension until proof made before the Master, after which the creditor may proceed with the action. The omission of a creditor to go before the Master, as directed by section 73, is not matter of plea, but of application to stay proceedings. *M'Kenzie v. The Sligo and Shannon R. Co.*, 520

4. The promoters of a projected Railway Company, provisionally registered, issued a prospectus setting forth the objects of the Company, and a list of the names of the provisional committee, in which that of A. was included. At a provisional meeting of the committee, resolutions were passed appointing a managing committee, amongst others, one giving them authority to allot shares. A. was not present at the meeting, but a copy of the resolutions was alleged to have been forwarded to him. On the 14th of October, A. accepted shares, which were duly allotted to him, and he paid the deposit. On the 30th of November, a petition for a bill not

having been presented to Parliament, the scheme was abandoned. An order was afterwards made for winding-up the Company. The Master found, that A. was liable to bear his rateable proportion of the expenses between the 14th of October and the 30th of November, and directed a call against A. of 10*l.* per share. The Master's report having been (for the purpose of appealing, but without argument,) confirmed by Lord *Cranworth*, (then Vice-Chancellor), A. appealed, on the ground that the order made him liable for too much. And the official manager appealed, on the ground that the order made A. liable for too little. The appeal having been set down to come on together:—*Held*, by the House of Lords, adopting the opinion of the Judges summoned to attend, that an association, such as the one before them, was within the Winding-up Acts, if the Court of Chancery thought proper to apply those Acts; *that* the order of the Court making A. liable to contribute to a call be reversed; *that* the appeal of the official manager be dismissed; *that* A. was not liable to any contribution beyond the deposit which he had actually paid; *that* a person only becomes liable as a contributory in respect of any contract he may have entered into, not in respect of any particular character he may have assumed; *that* there is no equitable, as distinguished from legal liability. *Bright, App.; Hutton, Resp., &c.*—Ch. 325





